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No. 12451

United States Court of Appeals

for the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

vs.

MARY ANN HARRINGTON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Montana.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MR. J. C. GARLINGTON,
Missoula, Montana,

MR. H. C. PAULY,
Missoula, Montana,

Attorneys for Appellant.

MR. J. J. McCAFFERY, JR.,
Butte, Montana,

MR. SMITHMOORE P. MYERS,
Seattle, Washington,

Attorneys for Appellee.

In the District Court of the United States
for the District of Montana

No. 245

MARY ANN HARRINGTON,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action alleges:

I.

That at all of the times herein mentioned the plaintiff was a resident and citizen of the State of Montana, and resided in the City of Butte, Montana; that the defendant, the Chicago, Milwaukee, St. Paul & Pacific Railway Company, is a corporation duly organized under and by virtue of the laws of the State of Wisconsin, and was such corporation during all of the times herein mentioned. That the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

II.

That the defendant corporation is now, and was at all of the times herein mentioned, the owner of

and engaged in the operation of its railroad in Interstate Commerce; that defendant corporation's main passenger line has its Western terminal at the City of Tacoma, Washington, and passes through the City of Seattle on its journey eastward through the states of Washington, Idaho, Montana, South Dakota, Minnesota, Wisconsin and into the State of Illinois.

III.

That on the 26th day of August, 1947, the plaintiff, accompanied by her daughter, Margaret, boarded the eastbound "Hiawatha" train of the defendant corporation as a passenger for hire, and was at said time the owner of a ticket entitling her to passage to the City of Butte, Montana, and had in addition thereto purchased from the defendant corporation a sleeping car ticket entitling her and her daughter to the possession of Section 12 of Car A-16 Touralux; that the aforesaid "Hiawatha" train is advertised by the defendant corporation, and known by the traveling public as a "Streamliner"; that the aforesaid "Streamliner" is also commonly known as an "Extra Fare Train," advertised as offering superior accommodations for speed and comfort to its passengers; that the plaintiff and her daughter boarded the said train as aforesaid at the City of Seattle, Washington, at or about the hour of 2:45 p.m. on the 26th day of August, 1947, and presented their sleeping car accommodations to the porter, and were by him

escorted to Section 12, Car A-16 Touralux; that upon reaching the aforesaid Section it was found to be occupied by a person or persons claiming to hold a reservation for the accommodations; that thereupon the porter summoned the conductor who advised the plaintiff and her daughter to take one of the unoccupied seats until the matter could be adjusted; that the aforesaid porter and the conductor were each acting as the servant and employee of the defendant corporation in escorting and directing the plaintiff to her seat in the aforesaid Touralux car.

IV.

That after the aforesaid train upon which the plaintiff was then riding, had departed from Seattle for a period of time estimated by the plaintiff to be 20-30 minutes, the train came to a stop; that during the stop the conductor notified the plaintiff that the confusion in the sale of the same Section to two different parties had been adjusted, and that she could occupy Section 12 of Car A-16 Touralux. That at said time plaintiff's daughter was absent from said car, and the plaintiff, without the assistance of the porter or the conductor, attempted to make the change from her temporary seat to Section 12 of said car; that the plaintiff at said time was of the age of seventy-five years, and the conductor, in the exercise of reasonable care and caution for the safety of his passengers, and particularly this plaintiff, knew, or in the exercise of reasonable

care should have known, that the plaintiff needed assistance in order to accomplish the move to Section 12; that the defendant's servant and employee, the conductor, negligently failed to render such assistance, or to summon the porter or other employee of the defendant, to assist the plaintiff, and permitted the plaintiff, an elderly woman, to make the change, herself; that while in the act of moving to Section 12 without the assistance of any of the employees of the defendant, and while in the act of hanging up her hat, the train upon which the plaintiff was riding was violently and suddenly jerked and put into motion by the employees of the defendant without any notice or warning whatsoever, although the car in which plaintiff was riding was equipped with a public address system for such purpose; that in order to hang her hat on the hook provided by the defendant in the aforesaid Section 12, it was necessary for the plaintiff to lean over the seat to reach the hook situated at a distance of five feet above the floor of the car; that the seat over which she was required to lean was approximately two feet in width, which required the plaintiff to lean forward in order to reach the hook, and while in such an off-balance position the defendant's employees negligently and carelessly put the train into motion with a violent and unusual jerk, which caught the plaintiff off-balance, and catapulted plaintiff backward and over the arm of the opposite seat, striking her back and knocking her to the floor; from which striking and falling the plaintiff

received the injuries hereinafter set forth. That the negligent acts and omissions of the defendant corporation, its servants and employees, which proximately caused plaintiff's injuries hereinafter alleged, were as follows:

a) By negligently and carelessly selling to the plaintiff and to other persons, unknown to the plaintiff, the same Section in Car A-16 Touralux whereby through such negligence and carelessness the plaintiff was unable to permanently locate herself before leaving the City of Seattle, Washington, on her journey to her home at Butte, Montana.

b) That the defendant, its servants and employees, were negligent and careless in failing to assist the plaintiff, an elderly person, to make the change to her permanent section, upon determination that she was entitled to such section.

c) That the defendant, its servants and employees, were negligent and careless in failing to notify or warn the passengers, and particularly this plaintiff, that the train was about to start, although the car in which plaintiff was riding was equipped with a public address system provided for such purpose.

d) That the defendant was negligent and careless in failing to provide proper facilities for the accommodation of the plaintiff's coat and hat, and knew, or in the exercise of reasonable care should have known, that the facilities so provided were inadequate, and in an unsafe condition to be used

while the train was in motion or being put into motion, because of the following defects:

1) That the hook was small, and required a person standing on an asphalt tile floor between the seats to reach over a two foot seat to the hook, placed at a distance of approximately five feet above the floor and upon the wall of the car by the window.

2) That the footing provided, as plaintiff is informed and believes, and therefore alleges, is constructed of a composition known as asphalt tile, and was slippery; whereas the aisle of said car was covered by a rug flooring, to provide secure footing.

e) That the Defendant in the exercise of the highest degree of care knew, or should have known that injuries were liable to be sustained by passengers, and particularly this plaintiff, because of the insecure footing provided by the Defendant in its Tour-alux Coaches in those portions thereof covered by a hard surface composition, namely that portion between the seats provided for occupancy of passengers and particularly should have anticipated injuries to passengers standing upon such hard surfaced material when the train lurched, swayed or gave an usual, unexpected or violent jerk.

V.

Plaintiff is informed and believes and therefore alleges, that the defendant company by and through its servant and employee, to wit: the conductor of said train on which the plaintiff was a passenger,

notified its doctor at Spokane, Washington, of the injury to plaintiff, and upon arrival in the City of Spokane, Washington, the said company doctor, whose name is to plaintiff unknown, boarded the train and examined the plaintiff; that upon plaintiff's arrival in the City of Butte, Montana, she was taken by ambulance from the train to St. James Hospital in said City, on the 27th day of August, 1947, where she was continuously confined, due to the injuries hereinafter set forth, until the 26th day of November, 1947; that she was attended by her family physician immediately upon her arrival at said hospital, and has been continuously under his care and treatment from the aforesaid 27th day of August, 1947, to the present time, and will continue to require services of the said physician for an indefinite period of time; that plaintiff is informed and believes, and therefore alleges, that she received the following injuries as a proximate result of negligent acts and omissions of the servants and employees of the defendant company as hereinabove alleged, to wit:

a) Ruptured right kidney accompanied by blood in urine with urinary retention.

b) Partial paralysis of both legs.

c) Tumor-like mass in lower abdomen extending from the illium on the right side to about two inches past the mid-line extending up about mid-way between the pubes and the umblicricus.

d) Shock, which persisted and continued for over two weeks after the injury.

e) Severe pain in back and lower right abdomen.

f) Severe headaches which have continued to the present time.

g) Noticeable swelling over parotid gland on left side of face.

h) An infection of the pelvis of the kidney.

j) A calcification in the pelvis of the right kidney resulting in a kidney stone of large size.

That by reason of the aforesaid injuries plaintiff has been bedridden since receiving said injuries, and because of infection which accompanied the injury to the kidney plaintiff repeatedly runs a temperature.

That on the 13th day of April, 1948, plaintiff was required to return to the St. James Hospital where she remained until the 29th day of April, 1948, at which time she suffered a slight cerebral embolus as a traumatic hemoragic nephritis, and was unconscious for approximately seventy-two hours; that said recurrence and hospitalization between the 13th day of April, 1948, and the twenty-ninth day of April, 1948, were a direct and proximate cause of the injuries heretofore alleged, and received on the 26th day of August, 1947, while a passenger on defendant's train.

That plaintiff is informed and believes and therefore alleges, that the aforesaid injuries are permanent in nature.

That as a direct and proximate result of the aforesaid injuries plaintiff was required to pay for hospitalization and nursing care the sum of approximately $3000.00, and will be required to pay for the services of her physician the sum of $1500.00.

VI.

That prior to receiving the aforesaid injuries the plaintiff was an able-bodied woman, in good health in mind and body, and of the age of seventy-five years; that since receiving said injuries the plaintiff has suffered great physical and mental pain, and will continue to suffer great physical and mental pain for some time to come, to plaintiff's damage in the sum of $50,000.00.

Wherefore, plaintiff prays judgment against the defendant for the sum of $50,000.00 general damages, and for the sum of $3500.00 special damages, and for her costs of suit herein expended.

/s/ McCAFFERY & McCAFFERY,
SMITHMOORE P. MYERS,
Attorneys for Plaintiff.

DEMAND FOR JURY TRIAL

Demand is hereby made for trial by jury herein.

McCAFFERY & McCAFFERY,
SMITHMOORE P. MYERS,
Attorneys for Plaintiff.

[Endorsed]: Filed August 28, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, and for its Answer to the Plaintiff's Complaint admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I.

II.

Admits the allegations of Paragraph II.

III.

Answering Paragraph III, the Defendant admits that on the 26th day of August, 1947, the Plaintiff, accompanied by her daughter, Margaret, boarded the Eastbound Hiawatha train of the Defendant as a passenger for hire, and was at said time the owner of a ticket entitling her to passage to the City of Butte, Montana, and that she had in addition thereto purchased from the Defendant a sleeping car ticket entitling her and her daughter to the occupancy of Section 12 of Car A-16 Touralux; the Defendant also admits that the Plaintiff and her daughter boarded the said train at the City of Seattle, Washington, on or about the hour of 2:45 p.m. on the 26th day of August, 1947, and presented their tickets to the employees acting for the Defendant in charge of said car. The Defendant further admits that the Hiawatha train is advertised by the De-

fendant and known by the public as a "Streamliner" train offering excellent accommodations for speed and comfort to its passengers. The Defendant denies all of the allegations of Paragraph III not herein specifically admitted.

IV.

Answering Paragraph IV, the Defendant admits that at the back of the seat in Section 12 where the Plaintiff was riding there was placed a short hook toward the top of the panel for the purpose of enabling wearing apparel to be hung there, and that to do so it was necessary for the person hanging it to lean over the seat itself; the Defendant admits that the car in which the Plaintiff was riding was equipped with a public address system; admits that the Plaintiff at that time was of the age of seventy-five (75) years or upwards, and needed assistance in order to move about in the train; the Defendant further admits that while the train was moving the Plaintiff was moving about in the Section where her seat was, and that she fell therein, as a result of which fall she received some injury. The Defendant denies all of the allegations of Paragraph IV not herein specifically admitted.

V.

Answering Paragraph V, the Defendant admits that at the request of the Plaintiff or her daughter, it called a physician to come to the train at Spokane, Washington, in order to examine the Plaintiff, and

that he did so, after which the Plaintiff continued on said train to her destination at Butte, Montana. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph V, and therefore denies the same.

VI.

Defendant denies the allegations of Paragraph VI, and all of the allegations of the Plaintiff's Complaint not herein specifically admitted or denied.

And for Its Affirmative Defense to the Plaintiff's Complaint, the Defendant Alleges:

I.

That the Car A-16 Touralux in which the Plaintiff was riding is a car of new and modern design, and was in clean and satisfactory condition for occupancy by the Plaintiff. That at the side of each seat, and within easy reach of a person sitting in the seat is a push button by means of which a bell signal can be sounded to call the porter on the car for any desired service or request. That on this car A-16 there was a porter assigned, among whose duties it was to render personal services with respect to clothing and baggage requested by passengers, and to respond to signals given by the bell system above referred to. The Defendant further alleges that upon information and belief that the Plaintiff was an experienced traveler on railroad

trains, and selected the Defendant's Hiawatha train for the purpose of having rapid transportation to her destination, and that she knew or in the exercise of reasonable care should have known that the porter was provided on the car for the service of passengers and that the public address system on the train was not used to notify the passengers each time the train stopped and started. The Defendant further alleges that the Plaintiff was an elderly, frail person, for whom it was difficult to move about with safety and security except with the assistance of another person.

II.

That plaintiff saw and realized, or by the exercise of reasonable care should have seen and realized, that the floor surface between the seats in Section 12 was a bare composition floor instead of a carpeted floor. That if said floor rendered the footing insecure for the plaintiff while standing thereon during travel, she knew and realized the same, or by the exercise of reasonable care should have done so, and should not have incurred the risk, if there was a risk, of standing and moving about on such floor without assistance.

That there was no urgency or necessity for the Plaintiff to hang her hat upon the hook by her seat, all as described in Paragraph IV of her Complaint, and that the Plaintiff should have waited to do so until she could obtain assistance, or should have requested someone else to do it for her. The De-

fendant therefore alleges that the Plaintiff negligently and carelessly failed to signal by the bell system which was readily convenient and available to her for the assistance of the porter, or otherwise to request his assistance, on the said Car A-16, and negligently and carelessly failed to wait for him to come and take care of her articles of wearing apparel as she desired, or to wait until her daughter traveling with her could do those things for her. The Defendant further alleges that the Plaintiff was negligent and careless in putting herself in a position of danger from falling or getting herself off balance as a result of normal train movements, which she in the exercise of reasonable care should have anticipated, knowing her own physical limitations and conditions as hereinabove alleged. The Defendant therefore alleges that such injury as the Plaintiff suffered as a result of her fall in said car was directly and proximately caused by her own contributing fault and negligence as herein alleged.

Wherefore, having fully answered, the Defendant prays that the Plaintiff take nothing by her Complaint, that the same be dismissed, and that the Defendant have judgment against the Plaintiff for its costs of action herein expended.

MURPHY, GARLINGTON & PAULY,

By /s/ J. C. GARLINGTON,

/s/ J. C. GARLINGTON,

Attorneys for Defendant.

[Endorsed]: Filed August 3, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, in the above-entitled cause, find our Verdict in favor of the Plaintiff and against the Defendant, and fix Plaintiff's damages in the amount of Fifteen Thousand Dollars ($15,000) Dollars.

/s/ JOHN F. FERRY,
Foreman.

[Endorsed]: Filed October 25, 1949.

In the District Court of the United States, District of Montana, Butte Division

No. 245

MARY ANN HARRINGTON,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

JUDGMENT

This action came on regularly for trial in the above-entitled Court and before the Honorable W. D. Murray, Judge, on the 19th day of October, 1949: The Plaintiff in said action appeared in person and was represented by her Attorneys, McCaffery &

McCaffery of Butte, Montana, and Smithmoore P. Myers of Seattle, Washington, and the Defendant Corporation was represented by its Counsel, Murphy, Garlington & Pauly of Missoula, Montana. A Jury of twelve (12) persons was duly and regularly impaneled and sworn to try said action. Witnesses on the parts of the Plaintiff and Defendant were sworn and examined, and cause was continued on the 20th and 21st days of October, 1949, and resumed on the 24th day of October, 1949, when after both sides had rested and arguments of counsel had been heard, and instructions of the Court given, the Jury retired to consider of its Verdict and subsequently returned into Court in the morning of the 25th day of October, 1949, and announced to the Court that a Verdict had been reached. That the Verdict of the Jury, omitting the title of Court and cause, is as follows:

Verdict

We, the Jury, in the above-entitled cause, find our Verdict in favor of the Plaintiff and against the Defendant, and fix Plaintiff's damages in the amount of Fifteen Thousand ($15,000.00) Dollars.

/s/ JOHN F. FERRY.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is Ordered, Adjudged, and Decreed, that said Mary Ann Harrington, Plaintiff, have and recover from the Chicago, Milwaukee, St. Paul & Pacific Railway Company, a corporation, Defendant, the sum of Fifteen Thou-

sand ($15,000.00) Dollars, together with her costs and disbursements incurred in this action, amounting to the sum of ..... ($....) Dollars.

Dated this 25th day of October, 1949.

/s/ W. D. MURRAY,
U. S. District Judge.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 26th day of October, 1949.

[Seal] /s/ H. H. WALKER,
Clerk.

[Endorsed]: Filed October 26, 1949.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR JUDGMENT

Defendant above named hereby moves the Court for an Order setting aside the verdict heretofore returned in favor of the Plaintiff in above entitled cause, and any judgment entered thereon, and entering judgment in favor of the Defendant and against the Plaintiff in accordance with Defendant's Motion for directed verdict made at the conclusion of all the evidence in the case.

MURPHY, GARLINGTON & PAULY,
/s/ J. C. GARLINGTON,
Attorneys for Defendant.

Recipt of copy acknowledged.

[Endorsed]: Filed November 1, 1949.

[Title of District Court and Cause.]

ORDER

The defendant's motion to set aside the verdict heretofore returned in favor of the plaintiff, and the judgment entered thereon, and enter judgment in favor of the defendant and against the plaintiff in accordance with defendant's motion for directed verdict made at the conclusion of all of the evidence in the case having been submitted to the Court, and the Court being fully advised in the premises,

It Is Therefore Ordered that the defendant's motion to set aside the verdict and enter judgment in favor of the defendant and against the plaintiff be and the same hereby is denied.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 26th day of November, 1949.

/s/ W. D. MURRAY,
U. S. District Judge.

[Endorsed]: Filed November 26, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeal for the Ninth Circuit from the final judgment entered in this action on the 26th day of October, 1949, in favor of the plaintiff and against the defendant.

Dated this 22nd day of December, 1949.

MURPHY, GARLINGTON & PAULY.
/s/ J. C. GARLINGTON,
/s/ H. C. PAULY,
Attorneys for Defendant.

[Endorsed]: Filed December 22, 1949.

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of counsel for defendant above named, and it appearing that the following exhibits, to-wit:

Defendant's Exhibit 1
Defendant's Exhibit 1-A
Defendant's Exhibit 1-B
Defendant's Exhibit 1-C
Defendant's Exhibit 1-D

received in the trial of this cause should, by reason of their contents, be sent to the Appellate Court pursuant to Rule 75 (i),

It Is Hereby Ordered, That all such original exhibits be by the Clerk of this Court duly certified to the United States Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said Court by mail with the Record on Appeal in said cause, said exhibits to be returned to the Clerk of this Court after the final disposition of said appeal, according to the practice of said Clerk of said Circuit Court of Appeals.

Dated This 9th day of January, 1950.

/s/ W. D. MURRAY,
District Judge.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH DEFENDANT INTENDS TO RELY ON APPEAL.

I.

The Court committed error in refusing to grant the defendant's motion for directed verdict upon one or more of the grounds specified by the defendant in said motion.

II.

The Court committed error in refusing to grant defendant's motion for judgment in its favor and against the plaintiff, setting aside the verdict theretofore returned in favor of the plaintiff in said cause.

III.

The Court committed error in giving the plaintiff's instruction designated No. 30 for each of the reasons specified by the defendant in its exceptions stated at the conclusion of the Court's charge to the jury.

IV.

That the Court committed error in charging the jury that all allegations of contributory negligence on the part of the plaintiff were withdrawn from the consideration of the jury except the question of whether the plaintiff was guilty of contributory negligence in putting herself in a position of danger from falling or getting herself off balance as a result of normal train movements, which she, in the

exercise of reasonable care, should have anticipated, knowing her own physical limitations, for the reason that such charge eliminated from the consideration of the jury other allegations of contributory negligence on the part of the plaintiff which were supported by competent evidence which should have been submitted to the jury for consideration.

MURPHY, GARLINGTON &
PAULY.
/s/ J. C. GARLINGTON,
/s/ H. C. PAULY,
Attorneys for Defendant.

[Endorsed]: Filed December 28, 1949.

In the District Court of the United States, District of Montana, Butte Division.

No. 245

MARY ANN HARRINGTON,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

REPORTER'S TRANSCRIPT
October 19, 1949

Be It Remembered, that this cause came on regularly for trial before the Honorable W. D. Murray,

United States District Judge for the District of Montana, sitting with a jury at Butte, Montana, on the 19th, 20th, 21st and 24th days of October, 1949, Messrs. Joseph J. McCaffery, Sr., Joseph J. McCaffery, Jr., of Butte, Montana, and Smithmoor P. Myers, of Seattle, Washington, appearing as attorneys for the plaintiff, and Messrs. J. C. Garlington and Harry C. Pauly, of Missoula, Montana, appearing as attorneys for the defendant.

Thereupon, the following proceedings were had:

Court: No. 245, Mary Ann Harrington vs. Chicago, Milwaukee, St. Paul and Pacific Railroad. Are the parties ready?

Mr. McCaffery, Jr.: Plaintiff is ready.

Mr. Garlington: Defendant is ready, your Honor.

Court: Very well, call the jury.

* * *

THOMAS FRANCIS NOLAN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Myers:

Q. State your name, please.

A. Thomas Francis Nolan.

Q. Where do you live, Mr. Nolan?

A. Chicago, Illinois.

Q. What is your occupation? [8*]

A. I am a Milwaukee Sleeping Car Conductor.

*** Page numbering appearing at bottom of page of original Reporter's Transcript.**

(Testimony of Thomas Francis Nolan.)

Q. Do you serve on one particular train for the Milwaukee? A. Yes, sir.

Q. And what is that train?

A. The Olympian Hiawatha.

Q. On August 26th, 1947, were you attached to and working on the section of the Olympian Hiawatha which left Seattle, Washington, for the East? A. Yes, sir.

Q. The Hiawatha is the Milwaukee line's streamliner, is it not? A. Yes, sir.

Q. Now, by the term "streamliner," do you mean it offers greater speed and service to the public?

A. No, sir, not necessarily; I don't think I would give that as a description.

Q. What do you mean by the term "streamliner"?

A. To me it means that particular train.

Q. Do you know the comparative speed of the Olympian or the Hiawatha and of the Milwaukee's Olympian between Seattle, Washington, and Butte?

A. No, sir.

Q. Do you know the difference between the times of the Hiawatha and the Olympian between Seattle and Butte, Montana?

A. What do you mean by times?

Q. Elapsed time from leaving Seattle until arriving at Butte, [9] Montana?

A. No, sir, I couldn't answer that.

Q. Do you know if the Hiawatha is considered a faster train than the others?

(Testimony of Thomas Francis Nolan.)

A. I will have to ask you to clarify your question. By "fast" what do you mean?

Q. That its schedule gets it from Seattle to any intermediate point, specifically, Butte, Montana, in less time than the schedule allowed for the Olympian?

A. I believe it makes better time. May I ask you, did you say from Seattle to——

Q. Butte.

A. I believe it does.

Q. On August 26, 1947, were you serving on the car of the Hiawatha which was designated as A-16 Touralux? A. Yes, sir.

Q. Now, for our information and that of the jury, what does the term "Touralux" mean?

A. It is my understanding that "Touralux" is a name that has been applied to that car and similar cars.

Q. It is a particular travel class?

A. I believe it is, sir.

Q. Does that correspond to what is called "Tourist Class" in most trains?

A. That is my understanding, sir. [10]

Q. Is the designation "A-16" a permanent designation for that car? A. No, sir.

Q. It was so designated on that particular day, is that correct? A. Yes, sir.

Q. Do you know which car was designated A-16 on that particular day? A. Yes, sir.

Q. What is the name of that car?

(Testimony of Thomas Francis Nolan.)

A. I cannot tell you the name of the car. I don't know the name of the car.

Q. But you are familiar with the particular car?

A. Yes, sir.

Q. Could you describe that car in any other way or identify it by number or by any other means?

A. That car is described by another number. I couldn't tell you at this time what the number was.

Q. Within a Touralux car, would you give us the approximate location of Section 12 as you stand looking forward in the car?

A. Section 12 is toward the front of the car.

Q. And is it to the right or left of the center as you face forward? A. It is to the left, sir.

Q. To the left. Where would Section 10 be in relation to Section 12?

A. It would be—looking forward in the car it would be immediately behind Section 12.

Q. On the same side of the aisle?

A. Yes, sir.

Q. Where would Section 14 be?

A. Section 14 would be immediately ahead of Section 12.

Q. Section 13?

A. Section 13 would be on the opposite side of the aisle and up one section.

Q. Would it be one section nearer the front than Section 12, then? A. Yes, sir.

Q. Will you describe the seat arrangements within these sections?

(Testimony of Thomas Francis Nolan.)

A. The section has two seats, what we call a forward seat and a backward seat. Both seats are double seats.

Q. And the two seats face each other, do they?

A. Yes, sir.

Q. What is between the sections, what type of partition? A. May I ask you what you mean?

Q. Between Section 12 and Section 14, for example?

A. There is what you might call—I would call it a wall or partition. [12]

Q. This partition extends to the top of the car, does it? A. Yes, sir.

Q. What is the approximate width of these seats from the back to the front?

A. I would say approximately two feet.

Q. They are rather heavily upholstered, are they not? A. They are upholstered.

Q. There is an upholstered back next to the partition? A. Yes, sir.

Q. What is the distance between the two facing seats in a particular section?

A. You mean the outer edge of the seats?

Q. Yes.

Mr. Pauly: May I ask a question for my information? You mean between two seats in the same section or across the aisle?

Q. No, between two seats in the same section.

A. I would say approximately two feet.

Q. What type of flooring or floor covering is

(Testimony of Thomas Francis Nolan.)

used on this space between facing seats in the same section?

A. It is a composition. That is about the only way I could describe it. A composition of some type.

Q. You are not sure of the particular, precise name for it?

A. No, sir, I have never heard it.

Q. What type of flooring or floor covering is used on the [13] aisle of this car?

A. A carpeting, sir.

Q. A carpeting. What facilities for hanging hats and coats exist in each of the sections?

A. Am I to understand you mean before the sections are made down into berths?

Q. Yes, that is correct, when the sections are made up as seats.

A. There are several hooks that are sometimes used for that purpose, and at other times a garment will be placed on a hanger and attached to what I might call a small sort of—not a shelf, it is a little width of wood over the berth. We often times do that, sir.

Q. There are particular hooks within a section, are there not?

A. There are hooks within a section. I won't say they are for the purpose of hanging coats on.

Q. There are, however, hooks on the partition between the sections, is that correct?

(Testimony of Thomas Francis Nolan.)

A. Yes, sir.

Q. On the partition back of each seat there is one hook? A. Yes, sir.

Q. That hook is some distance above the upholstered back of the seat, is that right?

A. Yes, sir. [14]

Q. And is over close to the window?

A. Yes, sir.

Q. Mr. Nolan, are you familiar with the accommodations in the First Class cars on the Hiawatha?

A. Well, I have a vague familiarity with them. I have not worked there.

Q. You do not yourself work there?

A. No, sir.

Q. You have been on occasion through them?

A. I have been through them, sir.

Q. Do you know what type flooring or floor covering is used in the floor space between the two facing seats in one particular section in the First Class cars?

Mr. Garlington: Just a moment. We would like now to make an objection to the answer to this question on the ground that the evidence called for is incompetent, irrelevant and immaterial in that it is apparent it was not a place where the accident occurred, and is offered for the purpose of developing a deficiency in the type of floor covering. We object to that for the reason that such allegations concerning the floor covering do not appear from the complaint to have been the proximate cause of any in-

(Testimony of Thomas Francis Nolan.)

jury suffered by the plaintiff, and for the further reason that this witness is not qualified to express any statement concerning the comparison of the facilities in the First Class cars, as distinguished from the Touralux [15] cars; for the further reason that any failure on the part of the defendant to provide facilities for taking care of hats and coats could not be in law a foreseeable cause of physical injury to a passenger, particularly when an adequate signal system and porter service is available. In order, your Honor, to shorten the matter and make it unnecessary to repeat this objection, may it be understood that would go to all testimony directed toward this point?

Court: Are you anticipating the Court's ruling?

Mr. Garlington: I want to make our position clear in that respect. Perhaps I am anticipating the Court's ruling, I hadn't thought of that. I am anxious to shorten the matter.

Court: Yes, well, the objection is overruled, and if you are satisfied, counsel, to let the objection stand as to all similar rulings, it is all right with the Court.

Mr. Garlington: As the situation develops, there may be some basis for an additional statement, but in order not to keep interrupting, I thought we might have an understanding.

Court: But so far as the Court is concerned, it may go to similar testimony that is offered. Proceed.

(Testimony of Thomas Francis Nolan.)

(Question read back by reporter as follows: "Do you know what type flooring or floor covering is used in the floor space between the two facing seats in one particular section in the First Class cars"?)

A. No, sir. [16]

Q. Isn't it true, Mr. Nolan, that rugging or carpeting is used in that location throughout First Class sections?

A. I believe so, but I can't describe them.

Q. You are not sure what type carpeting or rugging is used? A. No, sir.

Q. Returning again to the Touralux accommodations and to the car designated as A-16, what is the approximate width between seats across the aisle?

A. Do I understand you to mean between any two sections or seats directly across from each other?

Q. Opposite sides of the aisle, that is correct.

A. I would say approximately three feet.

Q. The composition flooring between the seats within a section, was that a linoleum type composition?

A. I don't believe it would be described as linoleum type.

Q. Can you describe its appearance for us?

A. It appears to be a hard material; I believe it is blocked off in little squares. Whether those squares are just a diagram, or whether it actually consists of squares, I won't say, I am not sure of

(Testimony of Thomas Francis Nolan.)

that. It is, I would say, a dark gray color. That is about the description I could give you.

Mr. Myers: That is all, Mr. Nolan.

Cross-Examination

By Mr. Pauly:

Q. You have referred to yourself as Sleeping Car Conductor. [17] For our information, will you tell us are there other conductors on the train ordinarily? A. Yes, sir.

Q. What other conductors?

A. Train conductor and Pullman conductor.

Q. As Sleeping Car conductor, what portion of the train do you concern yourself with at all times?

A. With the Touralux sleeping car accommodations.

Q. That is all? A. Yes, sir.

Q. You have nothing to do with the day coaches?

A. No, sir.

Q. You have nothing to do with the club car and observation car? A. No, sir.

Q. You have nothing to do with the dining car?

A. No, sir.

Q. Do you have anything to do with the Pullman section? A. No, sir.

Q. Your duties then are confined merely to the tourist sleeping cars? A. Yes, sir.

Q. How many, ordinarily, are there of such cars on the streamliner?

A. May I ask you if you are referring to ordinarily at that [18] time?

(Testimony of Thomas Francis Nolan.)

Q. Yes. A. Three cars, sir.

Q. What in general do your duties consist of, Mr. Nolan?

A. I supervise those sleeping cars, I lift tickets, that is the berth tickets and transportation tickets. I am charged with seeing that the cars are kept clean and that the service in the cars is satisfactory.

Q. Do you have anything to do with the operation of the train? A. No, sir.

Q. Do any of the conductors you refer to have anything to do with the general supervision of the whole train? A. The train conductor, sir.

Q. Would it be correct to say the Pullman conductor occupies a position corresponding to yours, only he has charge of the Pullman sections or first class sleeping accommodations? A. Yes, sir.

Mr. McCaffery, Jr.: If the Court please, could we have your indulgence for just a minute? (Examining photographs.)

Court: Yes, surely.

Q. (By Mr. Nolan): I hand you some photographs marked Defendant's Exhibit 1-A to 1—and I will give you the last number in a minute, and ask you if those photographs in general depict a section in the Touralux car such as you have described on direct testimony here? [19]

A. Yes, sir.

Q. The last number is Exhibit 1-D.

A. Yes, sir.

Q. Would you be able to tell us, Mr. Nolan,

(Testimony of Thomas Francis Nolan.)

if those pictures are pictures of Section 12 in Car A-16? A. Yes, sir.

Q. Directing your attention to Defendant's Exhibit 1-A, I will ask you if that is a picture showing the aisle in Touralux car A-16? A. It is, sir.

Q. And if Exhibit 1-B is a view of Section 12 in that car? A. Yes, sir.

Q. I have Exhibit 1-A here and ask you if that is a picture of Section 12? A. Yes, sir.

Q. Showing the seats of Section 12 in each of those pictures I last referred to? A. Yes, sir.

Q. And similarly in Exhibit 1-C?

A. Yes, sir.

Q. And Exhibit 1-D being a picture of the upper portion of Section 12 above the seats?

A. That's right, sir.

Mr. Pauly: We would like to offer these pictures in amplification of the testimony. [20]

Mr. Myers: I have one question in connection with them. Not to challenge the pictures, but how do you know these pictures are of Section 12 in Car A-16, Touralux?

A. It is marked in the photographs, the number of the berth shows in the photo.

Mr. Myers: You were not present when the pictures were taken? A. No, sir.

Mr. Myers: By looking at the photographs, you see the designation of the particular section?

A. Yes, sir.

Mr. Myers: There is nothing about this picture

(Testimony of Thomas Francis Nolan.)

or about these pictures which tie them specifically to the car A-16 Touralux, is there? A. No, sir.

Mr. Myers: Is Section 12 on all Touralux cars the same? A. The same in what respect sir?

Mr. Myers: Would it have the same dimensions and same accommodations so that a picture of Section 12 of one car would be a fair representation of Section 12 in any car? A. I believe so.

Mr. Myers: We have no objection.

Court: Very well, admitted without objection.

(At this point Defendant's Exhibits 1, 1-A, 1-B, 1-C and 1-D, being the photographs above identified were admitted in evidence without objection. [21] The same will be certified by the Clerk of this Court to the Court of Appeals.)

Q. In referring to the flooring on this particular car, you have briefly described the flooring as it exists between the seats and in the aisle between the seats. Let me ask you what kind of flooring does the car have at either end?

A. You would mean, I presume, in the aisleways at either end?

Q. Yes.

A. I believe it is the same material, same composition as that which is between the seats in any particular section.

Q. By that do I understand, then, it is of the same composition material?

A. I believe so, sir.

(Testimony of Thomas Francis Nolan.)

Q. And that is in the aisle portion at the end of the car after you leave the seats?

A. Yes, sir.

Q. Let me ask you if, in addition to the seats contained in the car, there are rest rooms or smoking rooms located at either end of the car?

A. Yes, sir.

Q. There is an aisle, is there not, that passes alongside of the smoking room or rest room in each end of the car? A. That's right, sir.

Q. In that aisle or passageway, as it passes the smoking compartments or rest rooms, I take it from your testimony that [22] is covered by the same composition material as used in the section between the seats? A. That is my opinion.

Q. It isn't covered with carpet?

A. No, sir.

Q. What kind of floor covering is there in the smoking rooms, rest rooms, located in each end of the car?

A. It differs, sir, in each one it differs slightly.

Q. What do you mean?

A. We have the Ladies lounge and Men's smoking lounge.

Q. What is in each, if you will describe it to us?

A. The men's smoking lounge in approximately half of the room it has carpeting and on the other half, it has a composition that I believe is similar to that mentioned before, although it is a different color, generally it is a different color. Whether that

(Testimony of Thomas Francis Nolan.)

indicates it is a different composition or not, I wouldn't be in a position to say.

Q. The men's room, then, is divided into two compartments?

A. Not exactly into two compartments. There is a long couch, you might call it, along one side of the room for lounging purposes. It is in front of that we have carpet. Then, there is a partial partition, what you might call a partial partition, coming out from either wall in front of this carpeting. It comes out part way, if you understand what I mean, it doesn't go all the way across, sort of a couple wings, [23] you might describe it.

Q. What is contained in that portion?

A. Back of those so-called wings?

Q. Yes.

A. It is back there where you have benches for lounging purposes and the floor in that section has carpeting.

Q. There is another section in there that you say is partially walled off. What is in that part partially walled off?

A. What I mean to say, this whole thing might be called one room. It has two wings coming out on either side. On one side is the lounge and carpeting, on the other side the wash basins, and off that the men's toilet.

Q. What is the flooring there?

A. It is a composition.

(Testimony of Thomas Francis Nolan.)

Q. What, in the ladies' room, does the flooring consist of?

A. The ladies' room, I believe, is all carpeted.

Q. Including a portion that has wash basins?

A. Yes, sir.

Q. At the end of each car there is a vestibule, is there not, connecting that car with the car behind it? A. Not in each end of it.

Q. At one end? A. One end.

Q. There is only one vestibule?

A. Yes, sir, only one vestibule on these cars. [24]

Q. What kind of flooring does it have?

A. That has, I believe, sheeting of some kind. I would describe it as steel sheeting or some kind of metal.

Q. Are you familiar with the type flooring that may exist on the day coaches?

A. Not too familiar, sir, I am not sure of it.

Q. Would you be able to tell us whether they are carpeted or whether they consist of composition similar to the composition used in portions of the Touralux car?

A. I can definitely say it isn't carpeted.

Q. But as to whether or not it is composition similar to that in the Touralux car?

A. I don't know. It is composition, but whether it is the same kind, I wouldn't know. If there is any great similarity, I wouldn't know.

Q. The dimensions you gave, Mr. Nolan, being approximate dimensions of the seats and distance

(Testimony of Thomas Francis Nolan.)

between the seats and between the seats across the aisle—let me ask you are those figures that you gave us based on measurements or your own estimation?

A. It was not based on measurements. It is what I might say on my own estimation. I am purely estimating those.

Q. The figures you gave us might then be in error to some extent? A. Quite likely, sir.

Q. Directing your attention to the photograph which is marked "Defendant's Exhibit 1-C", and which appears to show one seat in Section 12, I will ask you whether or not it shows any hooks on the walls? A. Yes, sir.

Q. And how many?

A. By the "wall" you are including the whole portion from the back of the seat up to the——

Q. To the ceiling, yes. A. I see two, sir.

Q. Would it be correct to say that one is located near the aisle and at the very top of the car or near the top of the car?

A. Yes, sir, that is correct.

Q. And there is another one which is located somewhat lower and below the berth as it is closed and near the window? A. Yes, sir.

Q. The latter hook appears to be a small hook, the high hook appears to be a larger hook?

A. Yes, sir.

Q. Directing your attention to the small hook that is located on the side nearest the window and below the berth, let me ask you if you know what is that hook generally used for?

(Testimony of Thomas Francis Nolan.)

A. I believe that hook is used to hang the lower berth hammock on. [26]

Q. After the berth is made up?

A. Yes, sir.

Q. After it is made up for occupancy as a bed?

A. Yes, sir.

Q. A hammock of netting is strung between that hook at one end of the section to a similar hook at the opposite end of the section? A. Yes, sir.

Q. What is the other hook generally used for, the larger hook, which is located higher up and near the top of the car, if you know?

A. I am not so sure. I hesitate to answer that because I am not sure.

Q. There are two other hooks similar to the ones shown in Exhibit 1-C located on the opposite wall of the section, are there not?

A. That's right, sir.

Q. And the same is true of each section?

A. Yes, sir.

Mr. Pauly: That is all.

Mr. Myers: No further questions.

(Witness excused.) [27]

MARY ANN HARRINGTON

plaintiff, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Would you please state your name?

(Testimony of Mary Ann Harrington.)

A. Mary A. Harrington, Mrs. Mary Ann Harrington.

Q. Mrs. Harrington, if you will speak as loudly, or a little louder so that the jury and judge may hear you. A. Yes, I will.

Q. What is your age, Mrs. Harrington?

A. 77.

Q. What is your birth date?

A. December 10th, I will be 78.

Q. You will be 78 in December? A. Yes.

Q. At the time when you were in Seattle on the 26th day of August, 1947, how old would you have been at that time, Mrs. Harrington?

A. 45, I would be 46 in December.

Q. It would have been 75s?

A. Yes, I was 75.

Q. That is what I mean. Where had you been, Mrs. Harrington, before you came to the City of Seattle?

A. I had been in Marysville, California. I had been down at [28] Salinas, California.

Q. Are your children, some of your children, in California, Mrs. Harrington?

A. Yes, one in Salinas, one in Sacramento and one in San Francisco that died in May.

Q. Did you make the train trip from Marysville to Seattle with your daughter, Marjory?

A. I made it.

Q. Do you recall the time of day, Mrs. Harrington, that you arrived in Seattle, on the 26th of August, 1947?

(Testimony of Mary Ann Harrington.)

A. In the afternoon. We come on the Southern Pacific to Portland, then had to change the trains in Portland to go to Seattle.

Q. Could you recall, Mrs. Harrington, whether or not the train that brought you to Seattle was late, or had it arrived on schedule?

A. I couldn't say.

Q. Could you say, Mrs. Harrington, or could you recall, whether or not you had much time to board the Hiawatha before it departed for Butte? A. No, not much time.

Q. Did you go into the station at Seattle to purchase a ticket?

A. My daughter went in and bought the ticket. We walked up the steps. I sat down in the waiting room. She went in and got the ticket. You see, I went down to Seattle in May and [29] drove down as far as Spokane, and then took the train out of Spokane for Seattle, and I had a married daughter who lived in Seattle. I visited with her until the latter part of June when my daughter came down after school was out. We stayed there awhile before we started for California.

Q. This was your return trip?

A. This was my return trip.

Q. Did you board the Hiawatha car A-16 on that day? A. On that day, yes.

Q. Can you recall whether or not you were assisted in boarding the train by a porter?

A. No, I can't.

(Testimony of Mary Ann Harrington.)

Q. You don't recall?

A. I guess maybe I was, but I can't recall.

Q. When you reached the inside of car A-16, Mrs. Harrington, did anything happen which you can recall as you were going into the train?

A. We had Section 12, and when we got to 12, why a lady and her two children had the section, and my daughter showed the porter, I guess, the tickets we had from California straight through to Butte, and so he went out, and so the conductor, I guess, I don't know who, but anyhow, he came back; and when we went in the first time, see, our Section was 12. He went in 10, which was back, so I sat down on the outside of the seat, you know, and my daughter didn't—she went on after I [30] was seated, she didn't sit down with me, you know. Then, when he came back, he had moved the ladies over in 13 then, so he said we could have our seat, and all I had to do was to get up and slide into the other seat. Then I discovered I was riding backwards on the train, and I wanted—the coats and hats was right opposite me on the other seat that was facing east, and I was, you know, riding backwards. The hat was on top the coats, and I said, "When the train stops, I will pick up my hat, hang it up and get on the seat near the window on the other side," so I got up and I picked up the hat, and I took one step and I reached to put it up. At that point the two trains went together, and I fell back.

(Testimony of Mary Ann Harrington.)

Q. Did your feet slip in any way, Mrs. Harrington?

A. Just with the jerk, they went straight out from under me and I went flat. I don't know how long I was there before the people on the other seat saw me and they picked me up and set me back in the seat. Then the conductor came along and said, "Tickets," and I said, "Well, I haven't got my ticket. I have been hurt, but my daughter has got them." The sleeping car conductor, the two were together, he said, "I picked up her ticket in the aisle or some place." So, they went on and they went out and a man in gray came in with them. He said, "Did any of you people see this lady fall?" They said, "We never saw her fall, but we picked her up." And the little girl, I guess maybe five or around there, I would say—she had two children—she said, "Well, mother, I saw the lady go to put her hat up, and she fell," and she said, "Shh, child, you are too young." So then (interrupted).

Q. Mrs. Harrington (interrupted).

A. In the meantime, this lady went and got my daughter, and she arrived when he was taking my statement. So then I sat there for awhile, and my daughter went and looked for the porter. He wasn't around, I don't know where she found the porter, and she asked him to make up my berth, and she helped me into the dressing room. There was a lounge and I laid down on the lounge until the bed

(Testimony of Mary Ann Harrington.)

was fixed, and she came and got me. I don't know how I was able to take those steps; it must have been the shock. I laid on the bed. She said, "I will undress you." I said, "No, I can't be undressed," I said, "I will just lie here."

Q. Mrs. Harrington, when you were told by the porter that you could move into your own section, did the porter assist you to move from Section 10 to Section 12?

A. He may have taken the suitcase. As I say, I didn't need much assistance, you know, because all I had to do was to just turn around and sit from 10 to 12 on the outside. The little suitcase was on the other side of me and the coats was in front.

Q. He had placed the suitcase on the seat?

A. Yes, a little kit.

Q. You negotiated the change by coming around the section [32] yourself?

A. Yes, just coming around.

Q. You described a fall, Mrs. Harrington. Do you recall in which part of the car you were after you had fallen?

A. Of course. My head went out in the aisle. I couldn't open my mouth the next morning. Then, a few days afterwards, my son said to me, "How did you get that bump up here?" I said, "I don't know."

Q. Mrs. Harrington, I think you said that the train came to a stop before you got up to hang up your hat, is that correct?

(Testimony of Mary Ann Harrington.)

A. Certainly. Sure the train stopped, and then I got up and picked up the hat and took a step. I had my hand up. I don't know whether I could have reached it or not. It was up further, and just then it was like two cars went together, like that. Then my feet went out and I went down.

Q. Mrs. Harrington, how would you describe the jerk?

A. I couldn't describe it in any other way than like it was two cars went together and my feet went out from under me on the slippery floor. There wasn't any carpet there. My head must have struck on carpet. If it hadn't, it would have been split open. I thought I was gone.

Q. Would you say the movement of the train was a sudden movement? A. Certainly.

Q. Did you have any warning of it of any kind?

A. No warning whatever.

Mr. Garlington: Just a minute, objected to, your Honor——

Mr. McCaffery, Jr.: We will withdraw the question.

Q. Mrs. Harrington, do you know whether the train had stopped at a scheduled stop at a station, or where?

A. I don't know anything about it, I couldn't say.

Q. Was Marjory Harrington, your daughter, with you at the time?

A. No, she was down in the dressing room.

(Testimony of Mary Ann Harrington.)

Q. Do you recall or can you recall how long you were out of Seattle when this stop was made?

A. I couldn't say.

Q. Would you say that it was the first stop that was made outside of the station?

A. I think I would. I think I would say it was the first stop because I know I was thinking when it stops, I will set over there near the window and hang up my hat. That was my thought. I wasn't thinking about falling down or any lawsuit, I'll tell you that.

Q. Mrs. Harrington, would you describe the shoes which you were wearing at that time?

A. I have them on now, rubber heels.

Q. Are they what women would understand as a low heel? A. Yes.

Q. They had rubber heels on at the time that this happened? [34]

A. When I bought them.

Q. When you bought them?

A. I never wear any other kind.

Q. Can you describe in any way, Mrs. Harrington, your fall at that time?

A. Well, I can't describe it any more than my two feet went right out when the jerk came from under me. I fell flat on my back. I don't know how long I was lying there, maybe just a few minutes, when people came over and picked me up. They set me where I was sitting, right near the aisle.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, could you say at this time whether or not you had struck the arm of the seat or any other objects?

A. No, I couldn't say. The only thing I know, I couldn't open my mouth the next morning with my jaw, so I don't know whether it was just the jar or what that did it.

Q. I believe you have stated that some people assisted you and placed you on your seat?

A. Yes, there was a couple of men and this lady. I think the lady took me by the head and shoulders. I don't know how they got me up. I think they called the conductor after this, because he said, "Did any of you see this lady fall?" They said, "No, we didn't see her fall, but we picked her up."

Q. How long would you say it was before any of the employees of the train arrived at your berth?

A. The conductor was the first one, the two conductors. [35]

Q. Did he come in answer to a call?

A. No, he was picking up tickets. He asked for my ticket. I said, "I don't have a ticket," that my daughter had it and that she was down in the train, and I said I had been hurt. He said, "Your ticket?" I said, "I haven't my ticket. I have been hurt. My daughter has my ticket." One of them spoke up and said he had picked up the two tickets.

Q. Did you tell the conductors that you had fallen?

(Testimony of Mary Ann Harrington.)

A. I told them I fell and was hurt and they went out and got a man in gray. I don't know who he was. Three of them were there and they asked people if they saw me fall.

Q. State whether or not they asked you if you needed a doctor or needed any attention?

A. No, not right at that point they didn't. The lady said, "I'll call your daughter." I said, "Maybe I will be all right for a few minutes." I said, "If you know where she is, why get her for me." They got her.

Q. Marjory returned, Marjory being Miss Harrington, your daughter?

A. In the meantime the conductors were there.

Q. Was Marjory there when the man you describe as the man in gray, was she there when he came?

A. Yes, I think she was, I think she just came down.

Q. Did the man in gray ask you any questions?

A. I can't say that he did or not. I was in too much pain. [36]

Q. Do you recall, Mrs. Harrington, whether he asked questions of any people in the car?

A. I don't know. Some of them said, "Did any of you people see this lady fall?" They said, "No, but we picked her up."

Q. Was the porter there at that time, Mrs. Harrington?

A. No, I didn't see the porter at all.

Q. When was the last time you saw the porter?

(Testimony of Mary Ann Harrington.)

A. When I waited by in that seat. He was very busy. I think he ran right down to the (interrupted).

Q. When did you next see the porter, Mrs. Harrington?

A. I don't remember seeing the porter any more.

Q. Did you see him make up your berth?

A. No, I was lying on the sofa in the rest room when he was making up the berth.

Q. Who assisted you to the ladies' rest room?

A. My daughter helped me to the rest room and then she led me back out when the berth was made and I just dropped into it. I didn't take off my clothes, didn't undress until I got in the hospital.

Q. Mrs. Harrington, some of the jury can't hear you. If you would speak a little louder so they could hear. When you were brought back from the ladies' rest room, Mrs. Harrington, did anybody assist you back?

A. My daughter. I just threw myself in the bed and stayed there. [37]

Q. Had the berth been made up?

A. The berth was made up. Then, when I got to Seattle, or to Spokane, the doctor got on the train and he examined my arms and my limbs. He said there wasn't any bones broken. I said, "I am in awful pain." He said, "I will give you something for that." He gave me two pills that knocked me

(Testimony of Mary Ann Harrington.)

out. I went off to sleep and I think I slept nearly until I got into Butte.

Q. Mrs. Harrington (interrupted).

A. I wasn't undressed at all.

Q. You were not undressed at any time?

A. No, I couldn't let them undress me, I was in too much pain.

Q. You remained in that condition until you arrived in the City of Butte?

A. City of Butte. Then they got a wheel chair and my daughter and a young man from Seattle that we knew helped me to get off the train and put me on the wheel chair.

Q. Did the porter or conductor or any railroad employees assist you in leaving the train?

A. No, my daughter and a young man took me off and got me in the wheel chair and wheeled me all the ways up to the depot. Before we got to the depot, the train had pulled out. There was a sister and they had called a taxi for her, so I got in the taxi with her and it went up to the hospital.

Q. Did anybody ask whether there was a doctor on the train, if you know? [38]

A. They asked, yes, Marjory did. They said a doctor would meet the train in Spokane and he did. He was right there when the train stopped in Spokane.

Q. Do you know whether or not that was a doctor for the railroad company?

(Testimony of Mary Ann Harrington.)

A. Yes, that was the railroad doctor, yes.

Q. It was. And did the porter or conductor or anybody inquire concerning your condition from the time that you were talking to them after your fall until the doctor administered those drugs to you in Spokane?

A. No, because I was lying in the berth all the time in pain.

Q. Were you in pain at that time, Mrs. Harrington?

A. I was in pain from the time I fell until—I am really not over all the pain yet.

Q. Mrs. Harrington, you say you were transported from the station in the City of Butte to where? A. City of Butte.

Q. When you arrived in the City of Butte, you had a wheel chair, and you were taken to a taxi?

A. No, I was taken up to the depot, and the taxi, the sister had got into the taxi. She was in the taxi, so she let me get in with her.

Q. Where were you taken from there?

A. To the hospital.

Q. That, I believe, was the 27th day of August, 1947, Mrs. [39] Harrington?

A. Yes, that was the date.

Q. How long were you in the hospital?

A. The day before Thanksgiving. I think that was the 27th day of November, and I had three trained nurses all the time. I was in a coma for 10 days after I got into the hospital. Then, in

(Testimony of Mary Ann Harrington.)

April, I went back to the hospital and I went into a coma again, and I was in there 17 days that time.

Q. That would be April, Mrs. Harrington, of 1948?

A. Yes, that would be about—no, not April, 1948. It would be last April, 1947, wouldn't it? Yes, 1948, pardon me, this is 1949.

Q. You were in there for 17 days?

A. 17 days. Then they took me home and put me to bed again.

Q. From the 27th day of November, 1947, to the 17th day of April, or to the month of April, on whichever date it was, in 1948, describe your activities to the jury with reference to being up and about and able to attend to your household duties.

A. They had to get me from the bed to the chair at first, and I would go back and until I guess it was, probably, let me see, I can't remember exactly.

Q. Would it refresh your recollection, Mrs. Harrington, that you came down for the first time on Easter Sunday?

A. Yes, I came down on Easter Sunday. I came down after dinner. I hadn't come down for dinner. I come down for a half-hour [40] and they took me back upstairs. I could get one foot on the stairs and they would lift the other foot. That is the way I got upstairs and I stayed there until,

(Testimony of Mary Ann Harrington.)

I guess maybe it was June that I would come downstairs with the cane and bannister.

Q. Did you, previous to the time of this accident, Mrs. Harrington, did you have use for a cane?

A. No, never, never.

Q. You stated, I believe, that in the month of June, 1948, you were able to get about with a cane?

A. With a cane I would get down. They would get me out and my daughter would take me in the car and I would go out for a little ride as far as the Five Mile or Nine Mile and then back. To this day, I can't lift a pot of coffee off the stove, so you know how weak I got.

Q. Mrs. Harrington, then, from the time of the occurrence of this accident on the 26th day of August, 1947, until the month of June, 1948, you were absolutely bedridden?

A. Most of the time.

Q. Is that correct? A. Yes.

Q. You stated, I believe, you had trained nurses, three of them a day while you were in the hospital?

A. In the hospital, and just one for four days after I came home. [41]

Q. I didn't hear that, Mrs. Harrington.

A. Then one I just had four days when I came home.

Q. Did you have the assistance of your daughters at home?

A. Always. They had to take care of me. They do yet.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, then, during the summer of 1948, you were able to get out occasionally?

A. Yes.

Q. Were you able to do any household work?

A. No.

Q. May I ask you, Mrs. Harrington, before this accident occurred, did you do your household work?

A. Helped with it, yes.

Q. You were able to get about?

A. Perfectly. I had very good health, I think, for a woman my age.

Q. You were able to visit your children?

A. Around in Butte?

Q. No around the country?

A. Yes, around the country for years, over 30 years. I travelled back and forth to California, Seattle, and home from California to Butte.

Q. How many children were in the family, Mrs. Harrington?

A. 13. 11 now. One died as a baby and the other boy died in May. (Sobbing.)

Q. Mrs. Harrington——(interrupted) [42]

A. Pardon me, but I couldn't help it.

(Whereupon, at 3:10 P.M., a recess was taken until 3:20 P.M., the same day, at which time the following proceedings were had:)

Mr. McCaffery, Jr.: If the Court please, at this time I would like to withdraw Mrs. Harrington and put Dr. Kane on the stand.

Court: Very well.

P. E. KANE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Please state your name.

A. P. E. Kane.

Q. What is your profession, Doctor?

A. Physician and surgeon.

Q. How long have you been a practicing physician and surgeon in the State of Montana?

A. 31 years.

Q. You were duly licensed at the time you were admitted to practice?

Mr. Pauly: May it please the Court, we will stipulate Dr. Kane is qualified as a doctor to testify.

Mr. McCaffery, Jr.: Thank you. [43]

Court: Very well.

Q. Doctor, are you acquainted with Mary Ann Harrington? A. Yes, sir.

Q. Have you acted as her physician for sometime? A. Yes, sir, I have.

Q. How long would you say that relationship has existed, Doctor?

A. I would say probably 25 years.

Q. Do you recall the 27th day of August, 1947, when Mrs. Harrington was brought to St. James Hospital in the City of Butte, Montana?

A. Yes, sir.

(Testimony of P. E. Kane.)

Q. When did you first see Mrs. Harrington that day?

A. I disremember what time it would be. She came to Butte on the train and was taken directly to the hospital. I don't recall whether it was morning or afternoon to be honest with you.

Q. Was she able to give you any history of injury at the time you first talked to her?

A. Yes. The history I got was she was injured in the train, I believe, in Seattle, in the coach.

Q. Was she conscious at that time, Doctor?

A. Yes, sir.

Q. What diagnosis did you make at the time?

A. On that particular visit, I didn't make any. She was in [44] quite severe pain, complained severely of her back and numbness of both legs. I had in mind a spinal injury there, some injury to the spinal column or cord. Subsequent X-rays, I think taken the following morning, didn't reveal any pathology to the spine or pelvis; and very soon after that, the third or fourth day, she started to pass blood in the urinary bladder.

Q. Would that indicate anything to you as to the nature of the injury?

A. Yes, I came to the conclusion then it was an injury to the kidneys or at least kidney.

Q. Was that diagnosis further demonstrated by physical signs later? A. Yes, sir.

Q. Would you describe the physical signs that developed later to the jury?

(Testimony of P. E. Kane.)

A. Bleeding was quite profuse. In fact, she got acute retention of urine where she could not urinate herself and had to be catheterized, and with each catheterization, it was almost pure blood. There developed on the fourth or fifth day in the abdomen a mass extending on the right side from the lower kidney region down to the top of the pubic bone, very hard and firm, not only being able to feel it, but you could see it, which, in my opinion, was what we call a retroperitoneal hemorrhage, or bleeding outside of the peritoneum, outside of the bowels, which came from the kidneys. [45]

Q. How long did the condition exist, Doctor?

A. Practically three months while she was in the hospital, and there has been evidence of bleeding from that time on and off from that time to the present.

Q. Doctor, did the tumor or mass which you have described eventually absorb? A. Yes.

Q. That was a physical manifestation of the bleeding in the kidney?

A. And from the outside of the kidney, yes.

Q. Yes. Doctor, how would you describe the injury to the kidney?

A. I have come to the conclusion that Mrs. Harrington suffered a ruptured kidney at the time of the accident.

Q. Has that condition persisted from that time until the present time? A. Yes, it has.

Q. From your treatment of the patient, Mrs.

(Testimony of P. E. Kane.)

Harrington, were you acquainted with her physical condition prior to the time of her injury?

A. Yes, sir, I was.

Q. State whether or not that condition or any condition similar to that existed before you saw her on the 27th day of August, 1947?

A. No, not to my knowledge, it didn't. [46]

Q. What would you say relative to Mrs. Harrington's physical condition before this accident?

A. I would say it was average or normal with the exception of a few colds or things the average person will have.

Q. As you were treating or administering to Mrs. Harrington in the hospital, Doctor, what was her condition with reference to consciousness after the first day or two she was in the hosptial?

A. I would say after about the fifth day—her condition grew steadily worse. After about the fifth day she got semi-conscious and irrational, and in fact went into complete unconsciousness and which lasted over a period of 72 hours, and that condition of semi-consciousness and being irrational persisted over a period of 12 or 14 days.

Q. Was it necessary to prescribe trained nurses for her attendance? A. Yes, sir.

Q. How long was it necessary that they be employed, Doctor?

A. I don't know definitely, but as I recall, it seems to me almost the entire time she was in the hospital.

(Testimony of P. E. Kane.)

Q. With respect to an injury of that nature, is that accompanied by pain?

A. Very much so as a rule, yes.

Q. Was it necessary, Doctor, in your treatment of the patient to administer intravenous injections?

A. Yes, she had numerous intravenous injections of salines and glucose and a number of intravenous injections of plasma to replace the lost blood, blood plasma.

Q. How long did that treatment continue, doctor? A. Practically two months.

Q. Would you say that the patient was in shock for any period?

A. Yes, I would. I would say she was practically in shock for a month, 30 days, approximately.

Q. In your diagnosis, what administrations did you recommend for the relief of pain, Doctor?

A. Well, just the ordinary remedies, opiates, morphine, codeine.

Q. How often would you say you visited her in the hospital from the 27th day of August to the 27th day of November, 1947?

A. I saw her several times a day for the first four to six weeks, and then every day after that at least.

Q. Was there any surgical repair indicated from the injury?

A. In Mrs. Harrington's case, no. So far as surgery, I deemed it out of the question due to her

(Testimony of P. E. Kane.)

physical condition, her age. I would consider it a case of bad judgment to use any surgery.

Q. In a younger person, Doctor, it would have been indicated?

A. It might have been, yes, possibly removal of the kidney.

Q. Doctor, did you make a subsequent examination on yesterday of the kidney? [48]

A. Yes, sir, I did.

Q. Did you find any complications which have arisen?

A. I found calcification in the pelvis of the right kidney on X-ray.

Q. Do you have the X-ray with you, Doctor?

A. Yes, sir.

Q. Doctor, handing you Plaintiff's Exhibit No. 1 for identification, I will ask you what that is?

A. That is an X-ray of the kidney region of Mrs. Mary Harrington.

Q. Was that made under your direction?

A. Yes, sir.

Q. By whom? A. Dr. Joe Kane.

Q. You were present at the time the examination was made and X-ray taken? A. Yes, sir.

Q. Doctor, when was that taken?

A. Yesterday afternoon.

Q. At your offices in the Lewisohn Building?

A. Yes, sir.

Mr. McCaffery, Jr.: We will offer Plaintiff's Exhibit 1 for identification in evidence.

(Testimony of P. E. Kane.)

Mr. Pauly: No objection.

Court: Very well, it is admitted without objection. [49]

(At this point, Plaintiff's Exhibit 1, being X-ray picture of the kidney region of the plaintiff, Mary Ann Harrington, was admitted in evidence without objection. The same will be certified by the Clerk of this Court to the Court of Appeals.)

Q. Doctor, from your X-ray examination, what complication did you find that had resulted from this injury?

A. Calcification filling the pelvis of the right kidney.

Q. Could you explain, Doctor, for the benefit of counsel and the jury how this calcification could arise from the injury?

A. Well, in case of hemorrhage of that type, there is no doubt, and which we see frequently happen in hemorrhages of this type, this certain amount of blood left in the pelvis of that kidney formed what we call an organized clot. It didn't absorb. Day by day it kept getting harder and harder, until what we call calcification, or commonly known as a stone, developed.

Q. Doctor, would you explain to the jury the relation which the kidney has through the pelvis tube to the bladder?

A. Well, it is hard to explain. The kidney it-

(Testimony of P. E. Kane.)

self, the solid substance of the kidney is a specialized organ, the primary function of which is to remove waste products from the blood that circulates in and through the kidney. The kidney is made up of pyramids, shaped like what we call pyramids, where blood flows through and waste products are extracted; and the pelvis of the kidney, as we speak of it, is a sac on the [50] side of the kidney that collects urine after it is extracted from the blood; and from the pelvis in the kidney, there is a small tube about the diameter of an ordinary match that runs from the kidney to the urinary bladder down under the *p*ubes that takes the urine to the bladder. The pelvis of the kidney is sort of a primary reservoir in the kidney itself for the collection of urine.

Q. Then, the urine would pass from the kidney into the pelvis sac and then into the bladder?

A. Down the tube into the bladder, yes.

Q. When the kidney is obstructed in the manner in which you have described Mrs. Harrington's injury, does that make elimination very painful?

A. As a rule, yes, and in her case, I believe a certain amount of blockage existed in that tube, too.

Q. Would you say, Doctor, that Mrs. Harrington had suffered a considerable amount of pain from her condition? A. Very much so, yes.

Q. Doctor, did you make any diagnosis of headaches or pain in the head?

A. Yes, she did complain quite severely of head-

(Testimony of P. E. Kane.)

aches, and it was a week or ten days after she was admitted to the hospital there was a visible swelling on the side of the face here (indicating), apparently due to striking it, I presume.

Q. Doctor, would you describe that as a swelling of the parotid [51] gland?

A. Yes, parotid gland, yes.

Q. When Mrs. Harrington was released from the hospital on the 27th day of November, 1947, Doctor was she dismissed as cured? A. No.

Q. What recommendations did you have for her care at home?

A. Absolute bed rest as she was having in the hospital. In fact, the pain in her back was so severe she could not help herself. She had to stay in bed.

Q. Would you say her physical condition, Doctor, had been impaired considerably because of her confinement to bed for that period?

A. Yes, I would.

Q. Had she lost considerable weight?

A. Yes.

Q. Nourishment was provided how, Doctor?

A. In the hospital most of it was intravenous. We relied most on glucose, salines and plasma. For a long time she was unable to tolerate solid foods at all, lived mostly on liquids.

Q. Did you visit Mrs. Harrington when she was confined at home? A. Yes, sir.

Q. Do you recall how long a period of time those visits were indicated? [52]

(Testimony of P. E. Kane.)

A. I visited her at home from the time she went home up to April.

Q. Would you say you visited her once a week, once a day, or what?

A. A couple of times a week or better, sometimes three.

Q. That would be in the latter part of 1947 and early part of 1948, up to the month of April?

A. Yes.

Q. In the month of April, did anything occur which required her removal to the hospital?

A. Yes, she had another, as we call it, acute suppression of urine. She couldn't urinate. What we were able to catheterize, we found blood again, quite profuse. At that time, she complained of severe headaches and nausea and vomiting, and I sent her back into the hospital. She was there, I believe, three or four days when she complained of this terrific pain in her head and again lapsed into unconsciousness and was irrational. At that time there was a diagnosis made of a pyelitis, which is an infection present in the pelvis of the kidney, and also she had at that time a cerebral embolus, a clot in the brain.

Q. That condition which was found to exist in April, 1948, Doctor, could you say that was directly caused by the injury which she had received the 27th of August, 1947?

A. In my opinion it was, yes.

Q. What was the physical effect of the embolus?

(Testimony of P. E. Kane.)

A. She was semi-conscious for several days and unable to help herself at all.

Q. Did the embolus manifest itself in the limbs in any way, Doctor?

A. The arms, one arm, I believe the right arm, and the right side of the face.

Q. Did the embolus dissolve subsequently?

A. Apparently so, yes.

Q. For the benefit of the jury, Doctor, would you describe what an embolus is?

A. It is a clot of blood. Frequently it might be vegetation off the heart. It gets loose in the blood stream and lodges some place where it is too small to intervene through the vessel and it cuts off the supply to that particular part of the body.

Q. Where an infection is present in a part of the body, Doctor, such as the pelvis sac, would that indicate that the foreign material had probably come from the situs of the infection?

A. We presume that, yes.

Q. Doctor, from your diagnosis made on the 27th day of August, 1947, and subsequently, would you say that her injuries could have been sustained from the fall which she described having had in the Milwaukee train?

A. Yes, I took that as the cause of it, yes. [54]

Q. Doctor, I believe you have stated that Mrs. Harrington was confined in the hospital for approximately 17 days in April, 1948? A. Yes.

Q. When she was discharged in April, 1948, what

(Testimony of P. E. Kane.)

was her condition with relation to being in good health, or what was her condition, Doctor?

A. No, she was still confined to bed at home after that.

Q. From your professional care of the patient, Doctor, state what you think her condition was from the 27th of August, 1947, to the month of June, 1948, after she went home from the hospital, with particular reference to whether or not she was bedridden and incapable of self care.

A. She was, yes.

Q. Can you describe, Doctor, at what time in your treatment of the patient, from the date of the injury on the 27th day of August, when you first saw her, to the present time, as to whether or not she has returned to a state of health?

A. She has improved. I wouldn't consider her back to normal health yet, no.

Q. When was the first time, Doctor, she was able to get about with any aid of any crutch or cane or other aid?

A. I don't believe she is getting along without a cane as yet that I know of.

Q. I had meant, Doctor, to direct your attention to the first [55] time she was able to even get about with a cane?

A. I don't recall the exact date; I wouldn't be able to state that.

Q. It would be sometime after her second visit to the hospital? A. Long after that, yes.

(Testimony of P. E. Kane.)

Q. Have you had occasion, Doctor, to visit Mrs. Harrington since she was released from the hospital in April, 1948? A. Oh, yes.

Q. On how many occasions, would you say, by the day or week or month, have you visited her since that time?

A. Probably three or four times a month.

Q. Have you been called to the home of Mrs. Harrington, recently, with a setback that she had, Doctor? A. Yes, on two occasions.

Q. Are you of the opinion at this time that she has recovered from her injuries?

A. No, I am not, I don't think she has fully recovered yet.

Q. Doctor, did you send a bill to the plaintiff for your services? A. No, I didn't.

Q. Would you state what your bill is at the present time for services rendered to Mrs. Harrington during her illness?

A. I think I said sometime ago it is $1,500.

Q. Would you say that the sum of $1,500 would be a reasonable [56] sum for the services which you had rendered to Mrs. Harrington over the past two years, as rendered in Silver Bow County, Montana?

A. I think so, yes.

Q. Do you believe at this time your services are at an end? A. Do I what?

Q. Do you believe at this time your services have been completed? A. No, I don't.

Q. You think she will require care in the future?

(Testimony of P. E. Kane.)

A. She has up to the present time, and that is what I am basing my future judgment on.

Q. Doctor, I had forgotten to ask you whether or not your bill has been paid? A. No.

Q. Doctor, I recall you stating that when you first treated Mrs. Harrington in the hospital, at one time in the first five or 10 days, she experienced some paralysis of both limbs? A. Yes.

Q. Did that persist for any length of time, Doctor?

A. As I recall, no. Several days, I would say.

Q. What did that condition indicate with respect to injury?

A. I diagnosed it traumatic neurosis of both legs.

Q. Explain the condition of traumatic neurosis to the jury, Doctor, how would you say it in common ordinary street language? [57]

A. Well, "traumatic", being due to external violence or an injury; and "neurosis", an inflammation of the nerve due to the trauma, and it apparently affected the sciatic nerves of both legs from the back down the leg.

Q. That is an effect which occasionally is experienced where an injury has been received, or a blow?

A. Yes.

Q. Do you recall, Doctor, the length of time that that persisted?

A. Not exactly. I think several days she complained.

Q. Is that considered painful?

(Testimony of P. E. Kane.)

A. In her particular case, the legs, not so much painful as loss of use of them.

Mr. McCaffery, Jr.: You may cross-examine.

Cross-Examination

By Mr. Pauly:

Q. Doctor Kane, I take it from your testimony that your diagnosis of her principal injury was a rupture of the kidney, is that correct?

A. Yes, sir.

Q. Will you explain to us just what constitutes a ruptured kidney?

A. It is a tearing of the capsule of the kidney, that is, the covering of it, and to some extent the kidney itself, the kidney [58] substance.

Q. A rupture could be a breakage or disturbance of any kind in any part of the tissue making up the kidney, could it not, or of the blood supply of the kidney, could it not?

A. Well, I wouldn't say blood supply to the kidney, no.

Q. Or of the blood vessels in the kidney?

A. In the kidney, yes.

Q. Any kind of a leakage or bruising to the kidney or to the blood system of the kidney, would constitute, in your language, a rupture of the kidney, wouldn't it? A. Yes, sir.

Q. The rupture might consist of simply a breakage of one blood vessel, might it not?

A. It might, yes.

(Testimony of P. E. Kane.)

Q. It might be more extensive than that, it might involve the tissue of the kidney itself?

A. Yes, sir.

Q. Do you have any opinion yourself as to what specifically may have been involved here in this particular case?

A. I don't understand, sir.

Q. Do you have any opinion yourself as to what specifically was involved in this particular case?

A. Yes, I have. It seems to me, in my opinion, it must have been a rupture of the perinephrium or functioning part of the kidney. [59]

Q. How do you determine that?

A. From the extravasation of blood and urine she had and the blood and tumor she had in the abdomen, the blood in the urine in large amounts are two ways.

Q. Both conditions could equally, or at least could result equally as well, could they not, Doctor, from simply a rupture of the blood system in the kidney?

A. Yes, but it would have to have, as we call leak out of the kidney, extravasation, in order to get this mass. That would have to be outside of the kidney itself.

Q. That would indicate some puncture, some leak, that would permit a blood mass to form here outside? A. Yes.

Q. The rupture, then, as I understand it, would still be a case of a loss of some blood of the kidney, which formed a growth or mass outside?

(Testimony of P. E. Kane.)

A. Coming from inside the kidney to the outside tissues, yes.

Q. An X-ray is of no help to you in diagnosing that condition is it, Doctor?

A. Not at that time particularly it wouldn't be, no. That is the X-ray itself. I might qualify that by saying a cystoscopic examination with X-ray would have shown it.

Q. Did you make such examination?

A. No, it was an acute condition, and it is to be avoided if it can, and it wasn't done for that reason, and secondly, she [60] was in such shock, I deemed it unwise to put her to that examination.

Q. Particularly a person of that age?

A. Yes, sir.

Q. Your diagnosis was based on such inferences as you might be able to draw from other signs?

A. Symptoms.

Q. And simply represents your opinion as to what the condition is? A. Yes, sir.

Q. That is not a matter that you or any doctor could assume to speak positively and with finality and without admission of some error?

A. From what Mrs. Harrington's present condition was and what it turned out to be afterwards, I would say yes, I could.

Q. As to the extent of the rupture, that sort of thing, however, doctors might disagree?

A. Yes, that is true, the extent of it.

Q. That would be largely a matter of your opinion of it?

(Testimony of P. E. Kane.)

A. If I understand what you mean right, you mean the extent the kidney might have been torn?

Q. Yes.

A. No, I don't know how that could be determined unless you opened it up and looked at it, there would be no way of doing it.

Q. Did I understand you, in referring to the pelvis, you are [61] speaking of the pelvis of the kidney and not the pelvis bone that most of us think of if we have ever heard of it?

A. No, they are two different structures. The semi-reservoir of the kidney is known as the pelvis of the kidney. It isn't bone, it is tissue.

Q. No injury to the pelvis bone?

A. No, sir, none we could determine.

Q. Did you take any X-rays of Mrs. Harrington at the time of your earliest examination?

A. Yes, X-rays were taken of the whole spinal column and the whole pelvic region.

Q. That for the reason, as I recall you explained, you thought there might be some injury to her back?

A. A spine or spinal cord fractures particularly we were looking for.

Q. Fracture of some bones, perhaps?

A. Yes.

Q. What was the result of those X-rays, Doctor?

A. Negative as regards fractures, no fractures.

Q. No fractures of any bones at all?

A. No.

(Testimony of P. E. Kane.)

Q. So that is not involved in Mrs. Harrington's case? A. No.

Q. The blood in the urine that you referred to, Doctor, I take it, was simply part of the elimination of the blood which [62] escaped from the same rupture, is that true? A. Yes.

Q. Some may have passed through her system with urine and the other collected within her abdomen as part of the blood clot? A. Yes.

Q. I understood you to say that the blood clot had not been fully absorbed?

A. In the abdomen, yes; in the pelvis of the kidney, I would say no, it was not.

Q. In that sac that is attached to the kidney, it is not fully absorbed? A. Yes.

Q. But so far as the portion that previously existed in the abdomen, that has been absorbed?

A. Yes.

Q. That clot, as I understand it, is now a small stone?

A. Yes, as I explained, the clot becomes what we call organized. Then, in the kidney particularly, waste products such as urates, phosphates, solids, are embodied in the normal urine, and they impregnate the clot and it becomes what we call calcified and turns into stone.

Q. It isn't at all uncommon to find kidney stones, is it, Doctor? A. No. [63]

Q. This is the kind of kidney stone generally referred to as a kidney stone, is it not?

(Testimony of P. E. Kane.)

A. Yes, sir.

Q. Stones sometimes occur without any history of injury as you have in this case?

A. In this particular case, the original plates didn't show it. It has occurred since the first plates were taken.

Q. It wasn't present in the first pictures?

A. No.

Q. Is it present now? A. Yes.

Q. Kidney stones do result, however, from functions in a person's body without the necessity of having any injury or rupture such as involved in this case? A. Yes, sir, that is true.

Q. In this particular case, then, Doctor, there is no way you can determine definitely that this particular stone you found here recently is necessarily connected with any blood clot occasioned at the time of this injury?

A. I am basing my opinion on the fact that the stone wasn't there previous to the injury or immediately afterwards. It is considerable size now, and the fact she had a hemorrhage there would lead me to believe it is an organized clot that became calcified.

Q. However, it would be possible for that stone to come from [64] ordinary solids in the waste matter of the kidney without in any way being connected with the blood clot, is that true, Doctor?

A. I suppose it would be possible.

Q. In your case you associate it with the injury

(Testimony of P. E. Kane.)

primarily since it has developed since the accident?

A. And since there was bleeding there, yes.

Q. But it is not impossible, of course, for it to have occurred wholly independent of and without any connection to the injury involved in this case?

A. It is possible.

Q. So far as that little stone is concerned, does it interfere with the functioning of the kidney?

A. Yes, this is large enough I presume it would, yes.

Q. In what way?

A. I think it is beginning to impinge upon the kidney substance itself; it is large enough to do it. It is certainly filling up the pelvis of that kidney to the extent it doesn't hold the amount of urine it should.

Q. Purely a mechanical obstruction?

A. Yes.

Q. It would be comparable, would it not, to having a rock in a bottle, preventing it, in the first place, from holding as much fluid as it would without the rock, and in the second place, it might interfere with the flow of water out of the bottle?

A. Yes.

Q. It is the only effect the kidney stone would have in this case?

A. It might cause some pain, some distress, which they usually do.

Q. In that condition, a kidney stone of this size is not at all uncommon in elderly people, is it?

A. I would certainly say they wouldn't be com-

(Testimony of P. E. Kane.)

mon in elderly people. I haven't seen too many of them.

Q. It isn't average, it isn't normal?

A. No, not normal.

Q. But many people do have kidney stones?

A. Yes.

Q. And that doesn't interfere with ordinary activity? A. Of the kidney?

Q. Yes.

A. Yes, it would. That kidney doesn't function as well as the other one.

Q. People do get along all right with stones?

A. Yes.

Q. There is no treatment that can be given to stones?

A. Surgical removal is the treatment.

Q. That is the only treatment? A. Yes.

Q. In this case, no surgery was advisable because of her age? [66] A. No, sir, that is true.

Q. Now, Doctor, accepting your judgment as to the kind of injury that had occurred to her kidney, bearing in mind Mrs. Harrington's general condition as you knew it before and the state of her age and all, that sort of injury would not be at all unexpected to you as a Doctor from any ordinary fall, isn't that true?

A. That it wouldn't be unexpected from an ordinary fall?

Q. Yes. A. Yes, it would.

Q. Well, Doctor, of course, everyone recognizes

(Testimony of P. E. Kane.)

that a fall, any kind of a fall, by an older person is a more hazardous matter than a fall by a younger person, isn't that true? A. True.

Q. It is true, is it not, Doctor, that that is because of the fact that they are more subject to injury, are they not?

A. Yes, I would say that their tolerance for injury probably is low. You might put it that way.

Q. Of course, the principal fear that most people have to a fall, or elderly people falling, is danger of breaking bones? A. Yes.

Q. But any fall of a person of her age could result in the bruising of tissue in the surface and interior, could it not? A. Yes.

Q. That is actually what happened here, was a bruising of the [67] tissue of the kidney?

A. No, it was a tearing of it more than a bruising, a rupturing.

Q. That would not be a surprising consequence of a fall?

A. It would be to me, yes, because we don't see ruptured kidneys very often from any type of injury.

Q. In this case, you believe it resulted from the fall? A. Yes.

Court: Then, the fall was more than just an ordinary fall?

A. In my opinion, it would be, Judge, yes. I would consider for a ruptured kidney, it would have to have been a severe fall.

(Testimony of P. E. Kane.)

Q. Well, Doctor, it might also reflect what sort of object she might have struck in the process of falling, too, isn't that true?

A. I don't know in Mrs. Harrington's case that I could answer that question. In my mind, I doubt very much if that kidney were struck. It may have been. I can't prove or disprove that, only from the history, and, as in all accident cases, the patient was very vague. All we know, she hit with force that hurt her back considerably. Whether she struck the kidney proper, or whether it was due to just the force of striking on her back that ruptured the kidney, I am unable to state. I would say it was a severe fall that did it. I would say it would have to be a severe fall to rupture a kidney. [68]

Q. A severe fall, or probably striking some object in the process of falling?

A. Or a severe blow in that region.

Q. Or a combination of both? A. Yes.

Q. Her recovery from the time you first dismissed her from the hospital around Thanksgiving of 1947, until her return in April, 1948, was generally satisfactory to you, was it not, Doctor?

A. No, I would say that her recovery was anything but pleasing to me. She was in bed, was in bed all that time. She had frequent upsets of the stomach, and frequent kick-ups in the urinary system, pain on urination, blood in the urine. There was some of that. It was good one day, bad the next. Progress wasn't satisfactory at all.

(Testimony of P. E. Kane.)

Q. Of course, in a person of her age, you would expect the recovery would be slower? A. Yes.

Q. What was the reason primarily for her return to the hospital in April, 1948?

A. The primary reason was she was passing large amounts of blood in the urine, vomiting, not being able to retain any solids or liquids whatever, headaches, pain in the back which she was complaining of having. I was more concerned with her nutritional welfare, that is, where she was vomiting, not [69] retaining liquids and losing large amounts of blood.

Q. What about the cerebral embolus you stated she had?

A. She had that three or four days after, in the hospital.

Q. An embolus you described as being a stoppage of the blood supply?

A. It is a clot in the artery to some particular part of the body, brain, lung, finger. It is——(interrupted).

Q. A mechanical obstruction? A. Yes.

Q. And again, what might be the source of that obstruction is merely a matter of opinion, is it not?

A. We base that on the tissue injured, where very frequently is found the embolus site, for instance a varicose vein or a bruise on the arm. This particular case, I took it it was from the kidney.

Q. Because of the injury to the kidney?

A. Yes, and the blood in the urine.

(Testimony of P. E. Kane.)

Q. That sort of cerebral condition can also result from a constriction in the blood vessel itself without any foreign object stopping it?

A. Not in the brain, I doubt that very much. We have a condition, which is open to argument, in the heart, or what they call coronary thrombosis where there may be and can be a constriction of the coronary vessels in the heart that would give the same symptoms as a clot, but in the brain that would not be [70] true. You have not the muscular structures present in the brain that you do in the other, the body of the heart.

Q. You do have cases of stoppages of blood in the brain such as this where there is no accompanying case of injured organs involved?

A. We frequently get them from what I term vegetation clots from the heart, what is commonly known as leakage of the heart. They sometimes will let go and get in the blood stream of the head, brain and heart too.

Q. Is that sort of condition, Doctor, the same as that what we generally refer to as a stroke?

A. Yes, with the exception of the explanation of the mechanics of it. A stroke, primarily, in nine cases out of ten, is due to a rupture of the blood vessel due to hypertension or high blood pressure. In other words, the vessel just blows out. It can't stand the pressure. The physical signs of a stroke or emboli or vegetation clot from the heart, they likewise can be the same.

(Testimony of P. E. Kane.)

Q. In any event, it is simply a matter of interference of circulation or supply? A. Yes, sir.

Q. It may be the result of a blowing up of a blood vessel, or in either case, an obstruction of the blood vessel, either coming from an injured part, or a part that is in no way involved in an injury?

A. Yes, sir.

Q. I realize in this case because of the fact she had the kidney condition you found to exist, with that condition, you attributed the kidney as being the source of that stoppage? A. Yes, sir.

Q. But there again you have no way of determining positively it was due to that and not something else?

A. Medicine is nothing but good detective work. You rule out each and every other possibility, and you come to the conclusion. In Mrs. Harrington's case, I found no reason to blame it on anything else but that.

Q. I realize that, but at the same time, you, as a good doctor, would have to admit your opinion could be wrong and it could have been attributed to some other fact? A. Yes, sir.

Q. There is no way of proving it?

A. No, sir.

Q. And your opinion is as good as anybody elses? A. Yes.

Q. In any event, Doctor, whatever numbness there might have been involved in connection with that condition of the right arm and face which

(Testimony of P. E. Kane.)

would indicate an involvement of some part of the brain, that condition has cleared up and been corrected, has it not? A. Yes. [72]

Q. So that whatever cerebral embolism may have existed, it wasn't a matter of any particular concern or lasting consequence? A. No, it is cleared.

Mr. Pauly: That is all.

Redirect Examination

By Mr. McCaffrey, Jr.:

Q. Doctor, with reference to the calcification found in the pelvis of the kidney, you stated, I believe, that condition did not exist when you first made your examination in August, 1947?

A. Yes, sir.

Q. However, you did find the stone and calcification to exist on yesterday, the 18th, or 19th day of October, 1949. Is there any way, Doctor, that you can describe the size of the stone at this time? Is it a large stone or small.

A. I would describe it as large, but it is hard to describe, it is irregular. In designating size of stones in kidneys, I would say it is large, yes.

Q. Would you say, Doctor, that if a person of Mrs. Harrington's age were to have been susceptible to a kidney stone prior in her life, that it would have developed at the age of 75, before her accident?

A. I couldn't answer that. It is possible, I suppose. [73]

Q. Is there any way to determine, Doctor, the growth of a kidney stone in any elapsed period of time?

(Testimony of P. E. Kane.)

A. No, there isn't, I wouldn't know of any. Some may form slow, some may form fast, but I don't know of any way you could calculate that.

Q. You said in answer to a question by Mr. Pauly that the condition in the kidney could have—it was possible for that condition to have developed without injury, or did I misinterpret your statement?

A. I think what Mr. Pauly referred to was that the stone could or does form without injury. I think I answer that as yes, they do.

Q. Did you, at any time, diagnose Mrs. Harrington's illness as serious, Doctor?

A. Yes, a week after she was in the hospital, I frankly didn't think she would live.

Q. Did you despair of her life on any occasion or any number of occasions? A. Yes.

Q. How many occasions?

A. On three different occasions I recall distinctly I told the family.

Mr. McCaffery, Jr.: That is all.

Mr. Pauly: That is all.

Court: Tell me this, what is the effect of the stone in [74] the kidney on the physical well being of the person?

A. The first effect is of an impediment to the free flow of urine into that pelvis. The second effect—and then physical pain accompanies that lots of times. Then, the second effect and most dangerous is that the stone will continue growing or accumu-

(Testimony of P. E. Kane.)

lating more calcium in the kidney until it fills the kidney itself and goes so far it will destroy a kidney if not removed.

Mr. McCaffery, Jr.: May I ask the Doctor a question I should have asked on direct examination, please?

Court: Very well.

Q. (By Mr. McCaffery, Jr.): Doctor, handing you Plaintiff's Exhibit 2 for identification, I will ask you to examine the exhibit, which is a bill from the St. James Hospital for services rendered to Mary Harrington on the 27th day of August, 1947, for her first confinement. Have you examined, the Exhibit, Doctor? A. Yes, sir.

Q. I will ask you whether the sum of $1018.80 is a reasonable sum for the services rendered as indicated on the bill to Mrs. Harrington from the 27th day of August, 1947, to the 26th day of November, 1947?

A. I am not familiar with their room rates down there, but the laboratory, X-ray and other services, I would say yes, it is very reasonable. [75]

Q. Would you say, Doctor, that those are sums usually charged for such care?

A. I don't know, I presume they are.

Q. Handing you Plaintiff's Exhibit 2-A, which is the bill from St. James Hospital for confinement from the 13th of April, 1948, to the 29th day of April, 1948, is that a reasonable charge for the services rendered?

(Testimony of P. E. Kane.)

A. Just being familiar with what work we do in the laboratory, what orders we may leave, the necessary use of oxygen or drugs is all I am familiar with, I would say yes, it is reasonable.

Q. Yes. Then, as to items other than room rent, may the testimony of the Doctor go as to those being reasonable charges in Silver Bow County, Montana?

Court: Yes.

Mr. McCaffery, Jr.: That is all.

Court: Any further questions, Mr. Pauly?

Mr. Pauly: No, your Honor.

(Witness excused.)

MARY ANN HARRINGTON

plaintiff, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination
(Continued)

By Mr. McCaffery, Jr.:

Q. Mrs. Harrington, do you recall going to St. James Hospital [76] when you arrived in the City of Butte? A. That's right, I recall it.

Q. Do you remember the first doctor you met there? A. Dr. Joe Kane going in the door.

Q. Dr. Joe Kane? A. Going in the door.

Q. Yes, were you admitted to a room in the hospital immediately, Mrs. Harrington?

A. I don't remember.

Q. You don't remember?

(Testimony of Mary Ann Harrington.)

A. I don't think I was, I think they had to, you know, take my name, find out about me, I guess, first. I can't recall very much about it.

Q. Have you had any occasion, Mrs. Harrington, to despair of regaining your health?

A. No, I have been pretty brave about it. I am always hoping I will.

Q. Have you had any doubts in your mind about it?

A. I might have had at first, I don't know.

Q. Did you at any time ask any of the children what their ideas were? A. No, I didn't.

Q. You don't remember asking Jerry?

A. No.

Q. Mrs. Harrington, in June of last year you said you felt [77] better and you were able to get out during the summer time? A. Yes.

Q. When were you again confined to your home without being able to get out? A. This year.

Q. That would be last year in September or October, or the fall of last year, was it?

A. No, sir, I wasn't able to get out. I was able to be around the house, but I didn't feel very good.

Q. Did you get out again this summer, Mrs. Harrington? A. Yes, I got out this summer.

Q. Have you been able?

A. I have been able to be helped in the car and get over to church in the side door and out into the car again. That is about the extent of my amusement.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, state whether or not the fall which you experienced in the railroad car was a severe, hard fall, or was it just an easy fall?

A. Oh, my, it was a terrible fall, I thought. I said, "I am done for".

Q. Did that come from a slight movement of the car, or was it a violent movement, or what was it, Mrs. Harrington?

A. It was a very violent jerk. As I said, it was just like two cars went together, like that. My feet went out from under me and I fell flat, my head striking out towards the aisle. [78]

Q. Can you state, Mrs. Harrington, whether your head was in the aisle and part of your body, or was it just your head, or what?

A. I can't state it. I am sure my head must have struck the rug or it would have been cut open with the fall the way I felt. The people that picked me up, they should know how far I was, you know.

Q. Mrs. Harrington, handing you Plaintiff's Exhibit 2 and 2-A, these are the bills for your hospital and doctor bills, Mrs. Harrington, at the St. James Hospital. You know that the sum of $1,018.80 was paid for you?

A. Yes, my daughter paid it. I couldn't write any checks.

Q. You couldn't do anything yourself?

A. Yes.

Q. That was for your account, however?

(Testimony of Mary Ann Harrington.)

A. Yes.

Q. You know the sum of $196.35 was paid for that second trip for you? A. Yes.

Q. State whether or not you were in Section 12 before the train left Seattle.

A. No, I am confused about that. I couldn't swear to that, although I think I thought I was at the time, but I can't swear to it now that I was seated when the train, before it started. I don't think I could have been. [79]

Q. You don't think you could have been?

A. I don't think I could have been because I think I would have hung up the hat and coat where I was sitting if I was in the train, I mean in my right seat. I never got in the right seat.

Q. Mrs. Harrington, how do you feel at the present time?

A. Oh, I feel pretty good, very weak. My strength is returning very slowly, but I think I am pretty good considering what I have gone through.

Q. Do you still experience the headaches, Mrs. Harrington? A. Off and on.

Q. Have you been required to take innumerable pills and other medicine?

A. Well, about two or three weeks ago I took some pills. I was upset and didn't feel good and had pains all over me.

Q. Did you, at any time, Mrs. Harrington, decide you weren't going to take any more pills?

A. Yes, I have thought I took enough of them,

(Testimony of Mary Ann Harrington.)

although I think what I took of them did me good. I know they eased the pain in my back.

Q. Mrs. Harrington, have you travelled considerably in your lifetime on trains?

A. For the last 42 or 43 years, I have, between California and Montana.

Q. Have you ever experienced in your travels a jerk like the [80] one which you experienced on this train?

A. I couldn't say that I did. I have often noticed jerks in the train, but I was never standing up on one.

Mr. McCaffery, Jr.: I think that is all. You may examine.

Cross-Examination

By Mr. Pauly:

Q. Mrs. Harrington, previous to this accident you testified that you went to Seattle and to California almost every year? A. Yes.

Q. To visit your children?

A. Yes, sometimes by automobile and sometimes by train.

Q. Sometimes by Milwaukee train?

A. Yes, as far as Seattle.

Q. You were accustomed to train travel, then, were you not? A. Very much so.

Q. Riding on trains was no novelty to you?

A. No.

Q. You had never been on this particular Milwaukee train before, had you?

(Testimony of Mary Ann Harrington.)

A. No, because I drove down in May by automobile.

Q. I didn't hear you.

A. I say I drove down by automobile in May to Spokane.

Q. Who was with you driving to Spokane? [81]

A. Why, my son-in-law, Mr. Roach and my niece, Miss Roach.

Q. And from there?

A. He drove as far as Spokane and we took the train out in the morning and it was a Great Northern train. There was no other train to take in the morning. We didn't want to wait over until night.

Q. On previous trips you had returned from Seattle to Butte on some occasions using the Milwaukee train? A. Yes, sir.

Q. In this particular case, as I understand it, you were coming back from Marysville, California?

A. From Marysville, California.

Q. You had to make a change in Seattle?

A. We did. They don't have a regular train coming up to Portland from Marysville. You have to take a train that comes from San Francisco. It stops at Marysville and takes you up to Gerber to get on the regular train. On that train we had standard tickets, but we couldn't get a standard ticket out of Seattle unless we waited longer.

Q. You had a Pullman up to Seattle?

A. Up to Seattle.

Q. You couldn't get one out of Seattle?

(Testimony of Mary Ann Harrington.)

A. My daughter got tickets all the way through from Seattle to Marysville and to Butte, but on the standard only as far as Portland. [82]

Q. So I get this straight, your daughter in Marysville got your sleeper——(interrupted)

A. No, this daughter here.

Q. Yes. While in Marysville she got a sleeper ticket clear from Marysville to Seattle and from Seattle on to Butte?

A. On to Butte, yes. She has the tickets there with her.

Q. You had a Pullman ticket from Marysville to Seattle and a tourist sleeper accommodation from Seattle to Butte? A. From Seattle to Butte.

Q. Now, your daughter also had her transportation ticket clear through from Marysville to Butte, didn't she?

A. The transportation from Butte, wasn't it? You see, she bought her tickets in Butte, and bought mine from Seattle, a round trip to California and then back to Seattle. Then, when we got back to Seattle, she had her ticket to Butte, but I had to buy my ticket from Seattle to Butte, but she had hers, and we had a section.

Q. All right. On arriving in Seattle, your daughter had her own transportation from Seattle to Butte. She also had sleeper accommodations for the two of you? A. Yes.

Q. In Section 12? A. Yes, Section 12.

Q. Car A-16? A. Yes. [83]

(Testimony of Mary Ann Harrington.)

Q. But didn't have your transportation ticket from Seattle to Butte. She had to pick that up in Seattle? A. Yes.

Q. Going back to what I started with, the train you came into Seattle on from Portland stopped and ended its run there at Seattle, did it not?

A. Yes.

Q. You had to get off that train and get on the Milwaukee train? A. Yes.

Q. Did both those trains use the same station in Seattle?

A. I don't know, but I know I walked up the steps to the waiting room when she went in to get my tickets, you know, then I walked back on down.

Q. You did not leave that station?

A. No.

Q. You got on the Milwaukee train at the same station? A. At the same station.

Q. Do you know how much time elapsed between the time you arrived on the train from Marysville and the time your Milwaukee train left, approximately how much time elapsed, do you know?

A. I didn't pay any attention, but it wasn't very long. You mean from Marysville?

Q. I just mean how long in the station at Seattle, 15 or 20 [84] minutes?

A. Just long enough to get the ticket.

Q. What luggage did you have with you at that time, do you know?

(Testimony of Mary Ann Harrington.)

A. We just had, we just took one suitcase and a little kit case for ourselves, a small suitcase.

Q. That is all you had with you to take on the Milwaukee train? A. Yes.

Q. Did you have any other bags you checked?

A. We checked through.

Q. You had other bags?

A. We checked other bags through from California.

Q. You didn't have to bother with them from Seattle?

A. I don't know whether we checked some from Seattle, I am not sure of that. I didn't have anything to do with that.

Q. But in any event, the only bags you had to take with you on the Milwaukee train was one suitcase and a small overnight case? A. Yes.

Q. You had coats with you? A. Yes.

Q. Did you have a red cap at the station to help you with the luggage and coats?

A. No. [85]

Q. Who carried your luggage?

A. I believe the porter took the suitcase himself for carrying it on down. I guess he carried it in. I am confused about it. I said we had no porter, but then I would guess we did because I wasn't carrying any baggage myself.

Q. Regarding your boarding the train, Mrs. Harrington, was the porter present in the train when you got on, do you know?

(Testimony of Mary Ann Harrington.)

A. Yes, I think he must have taken the suitcase when we got on.

Q. You think he took your suitcase and took you on the train?

A. I mean when we got on the steps. You mean getting on the train?

Q. Yes.

A. As far as I can remember, he was ahead.

Q. The porter was there? A. Yes.

Q. And he helped you on the train?

A. I suppose he did. He had the stool there, you know. I am confused about that. I might have walked up on it.

Q. Did he show you to your space?

A. Yes and the lady and two children had the space.

Q. That was in Section 12?

A. In Section 12.

Q. The porter was with you at that time?

A. Yes, because my daughter showed him we had tickets through [86] from California, so he went out, and I don't know who he saw, but he came back and told us he had moved the lady in the meantime and her children over to 13 across the aisle.

Q. Before we get into that, when you first arrived at Section 12, there was a lady and two children sitting in it? A. Yes.

Q. Did they get out of there immediately?

A. No, they didn't get out of there until the

(Testimony of Mary Ann Harrington.)

porter got our tickets. He went out and saw the conductor there, I guess.

Q. Where did you sit then?

A. Right in 10, right back of 12.

Q. You recall definitely that was Section 10?

A. Yes, the seat right near the aisle. All I had to do when he said we could have our section was to just get up from the seat and get into the other right there.

Q. There was nobody sitting in Section 10?

A. No, not at that time.

Q. You sat on the seat in Section 10 which was nearest to Section 12? A. Yes, 12.

Q. What was done with your bags at that time, do you know?

A. I don't know whether he slipped the bag under 12 when he went out or not, but the little one was on the seat next to me.

Q. You don't know what happened to the big bag?

A. No, I don't know whether he dropped it there when he looked [87] to see about the tickets or not.

Q. You don't know whether the big bag was put in Section 10 along with you?

A. I can't remember that part.

Q. You don't have any recollection as to what happened to the bag?

A. I just didn't pay any attention.

Q. Were the coats put in Section 10 with you?

(Testimony of Mary Ann Harrington.)

A. Yes, the coats were in Section 10 right on the seat.

Q. Was your daughter with you at that time?

A. Until I sat down, yes, then she went on. She didn't sit down at all.

Q. Had the train left Seattle then?

A. I think the train must have left Seattle. I didn't think it did, but I am sure it must have left Seattle.

Q. The porter hadn't come back yet?

A. He came back when he said we could have our seats, and then he went right on again.

Q. Let's just back up again. I am confused myself as to what the facts are. As I get it, you and your daughter got on the train with the porter?

A. Yes.

Q. You went down the aisle to Section 12?

A. Yes.

Q. There was a lady and two children there in your seat, so [88] that you sat in Section 10?

A. Yes.

Q. You don't know what happened to your bag, but the overnight case and your coats were left there in Section 10 with you and the porter then left. Now, did your daughter then leave?

A. My daughter left, yes.

Q. While you were sitting in Section 10?

A. No, no, after I had moved into Section 12.

Q. Then before your daughter left, did the porter come back? A. No.

(Testimony of Mary Ann Harrington.)

Q. How did you get into Section 12, then?

A. He came back to Section 10 and told us we could have that, he had moved the lady and two children, he or someone else had moved her over to 13.

Q. Was your daughter there then?

A. Yes, she went right on then after I got up and was sitting in the next seat. You see, I was sitting this way, my back facing east, and the other seat in front of me in number 12 was facing—anyhow, I was facing west and going east.

Q. You just got up out of the seat in Section 10 and went around the partition and sat down in Section 12 in the seat nearest to Section 10, is that right? A. Yes.

Q. You moved as soon as the porter came and told you the lady [89] had gotten out of there?

A. Yes, I don't know how long the lady was out, but she was all seated.

Q. The porter was there and you moved as soon as he told you? A. Yes.

Q. All you did was get up, turn around and go into the other space? A. Yes.

Q. The porter was right there, was he not?

A. He was right there when he told us we could have it, then he went on right down the aisle. He was pretty busy getting people straightened out.

Q. You don't know where your suitcase was?

A. No. The little one was on the seat, but he must have put the other one under 12.

(Testimony of Mary Ann Harrington.)

Q. You think he put the other suitcase under 12? A. I am not sure.

Q. Do you know what happened to the overnight bag? Do you know whether he put that in Section 12?

A. He must have, he must have dropped it in there.

Q. While you were going around?

A. Yes.

Q. Do you know whether he moved your coats?

A. I don't know whether he moved my coats or whether my daughter moved them. [90]

Q. Your daughter was still there, is that right?

A. I don't know. She was right there when he said we could have our seats, and she may have picked them up then. I didn't ask her anything about them, but I know she put the hat right on top of the coats. Then I discovered I was riding backwards——(interrupted)

Q. Your daughter was still with you when you moved out of 10 into 12?

A. She was still there, but she didn't sit down.

Q. She didn't sit down?

A. She didn't sit down.

Q. Where did she go?

A. She went to the waiting room.

Q. Waiting room?

A. Waiting room or dressing room, I guess.

Q. At the time you made the move, do you know whether you were still in Seattle?

(Testimony of Mary Ann Harrington.)

A. I don't know, but the train must have been moving because I knew I was riding backwards.

Q. Do you know the train was moving at the time you moved from Section 10 to 12?

A. When I got up?

Q. Yes. A. I couldn't say.

Q. You don't know whether the train was moving or standing [91] still?

A. I remember that right away I thought, "I am riding backwards."

Q. At the time you walked from 10 to 12, you don't know whether the train was then standing still or moving? A. No.

Court: She has answered the question half a dozen times, counsel, I don't think you have to go over and over it again. She said she don't remember.

Mr. Pauly: I misunderstood, I am sorry. I haven't understood that she definitely answered that. I don't intend to repeat, no, but I do want to have an answer.

Court: Mrs. Harrington, didn't you say you don't remember whether the train was moving or not at the time you moved from Section 10 to Section 12?

A. I can't recall, but I know right away I noticed I was riding backwards.

Q. (By Mr. Pauly): Where were your coats and your overnight bag put?

A. The overnight bag was lying on the side

(Testimony of Mary Ann Harrington.)

near the window and I was seated along side of it near the aisle.

Q. The overnight bag was put on the same seat you were sitting on? A. Yes.

Q. The coats were put where? [92]

A. Opposite me.

Q. On the opposite seat?

A. On the opposite seat.

Q. Do you recall near the aisle or near the window?

A. Near the aisle. I never got near the window. That was my idea in picking up the hat and getting up.

Q. Where was the hat?

A. On top of the coats. I said, "When the train stops, I'll hang up my hat and get over near the window, change my seat." When the train stopped, I got up and picked up my hat. My hat was right in the seat opposite me. I picked up the hat and made one step down towards the window, and I had my hand up like this (indicating) to throw the hat up. The hook was up high, and before I could even throw it, why the train gave a terrible jerk and the hat went under the seat.

Q. Was the train stopped or in motion, do you know, when you first started to move the hat?

A. The train was stopped, or I wouldn't get up to try it. The train was stopped, and I picked it up and when I gave one step down to throw up the hat, the train just gave a jerk, just like that.

(Testimony of Mary Ann Harrington.)

My two feet went out from under me, and I fell down.

Q. Is it your thought the jerk occurred as the train started or after it had gotten under way?

A. I was so knocked out, I can't remember that.

Q. You don't know? [93]

A. I don't know whether it was going then or not. It was just like one car bumped into another, the jerk.

Q. Mrs. Harrington, I show you a picture here marked Defendant's Exhibit Number 1-A, and I will ask you if that, if, according to your recollection, that is a fair picture of the section you were sitting in at the time of the accident?

A. That is. I was sitting right here (indicating).

Q. Just answer the question. Do you recognize it?

A. Yes, here it shows the hook away over here up high (indicating).

Q. That is what I am going to ask you. Does that show the hook?

A. I can't see the hook. It was there (indicating).

Q. As a matter of fact, you are pointing to the hook in the picture as you point.

A. That is all I saw. I reached over and picked the hat up here (indicating). I just made about one step and got my hand about half ways up to throw it when the jerk came.

(Testimony of Mary Ann Harrington.)

Q. Mrs. Harrington, will you again point out to Mr. McCaffery where the hook is that you were trying to hang your hat on?

A. Right here (indicating). That is the only hook I saw.

Mr. McCaffery, Jr.: If the Court please, I will make this with the letter X on the Exhibit, which is Defendant's Exhibit 1-A.

Witness: I could see it very distinctly when I was sitting [94] down.

Q. And you were sitting here next to the aisle?

A. Right here (indicating).

Q. In the seat opposite the hook?

A. The seat opposite the hook. That is the only hook I saw. I saw that hook and picked up the hat off the coat right here (indicating).

Q. Mrs. Harrington, if I write the word "seated" here where you have just pointed—I have written the word "seated." That is the place you were sitting before you tried to hang the hat?

A. Yes, and this is where the hat was, right opposite (indicating).

Q. I will write the word "hat" where you have pointed.

A. I picked up the hat and took it and just took about one step down here (indicating), as near as I can remember, the one step, and lifted up my hand just like that (indicating) to throw up the hat when the jerk came and my two feet went straight out from under me, and I went

(Testimony of Mary Ann Harrington.)

backwards, flat on my back, and the hat went under the seat. It was still there when the conductors came in.

Q. You don't know how far from Seattle the train was at that time?

A. No, I wasn't paying any attention to how far it was out.

Q. Are you familiar with any of the other stations after you leave Seattle? [95]

A. No, I am not familiar with them, because mostly always when I left Seattle before, I left at night.

Q. Would you be able to tell us how long it was after you left Seattle?

A. No, I can't even tell you how long it was, whether it was 10, 15 or 20 minutes even, I don't know. All I remember I am riding backwards. I am going to get up when the train stops and hang up my hat and move over there.

Q. You have referred to this as being a jerk like two cars coming together?

A. Yes, just an awful jerk.

Q. Am I correct in understanding that you mean by that a jerk such as if they had coupled on another car to the train?

A. That is what I thought it must have been.

Q. You thought they were coupling another car on to the train? A. Yes.

Q. You didn't mean by that you thought another train had run into the one you were riding

(Testimony of Mary Ann Harrington.)

on?

A. No, I thought they had put on another car and gave a jerk.

Q. I don't suppose you are familiar with the way cars are coupled together, are you, Mrs. Harrington? A. No.

Q. In hanging up the hat, did you lean over the seat so as to reach the hook? [96]

A. No, I never leaned over the seat. If I was leaning over the seat, I guess maybe I would have been protected.

Q. Did you have one knee on the seat?

A. No, I did not.

Q. You had both feet on the floor.

A. Both feet on the floor, and both feet went out together.

Q. I understand in the complant it is alleged you were off balance. Were you off balance at the time you were trying to hang up the hat and this jerk occurred?

A. Off balance, you mean standing in the middle of the aisle to throw up the hat?

Q. In the middle of the space between the two seats.

A. Yes, in the middle of the space, I would say, close to the seat near the window, that maybe I got that far. I must have when I tried to hang up the hat. That is when the jerk came.

Q. You were facing?

(Testimony of Mary Ann Harrington.)

A. I was facing the window, and the hook was right along side the window.

Q. You were not bending over?

A. I was not bending over.

Q. You had both feet on the floor?

A. Both feet on the ground.

Q. Did you fall backwards?

A Fell backwards, yes. My two feet went toward the window and my head went toward the aisle. I can't say how far my head [97] went, because I don't know how long I was lying there before the people saw me.

Q. Do you know whether you hit the seat before striking the floor? A. No, I don't.

Q. Your daughter wasn't present?

A. No, she wasn't present.

Q. She had not returned?

A. She had not returned. This lady said, "I'll go and get your daughter," she said. I said to her first, "Oh, maybe I will be all right." I remember that.

Q. That was after you had been picked up?

A. After I had been picked up. Then I said, "Do you know where my daughter is?" Then she said, "Yes," so she went and got her. Before she got down, two conductors come along.

Q. To pick up the tickets?

A. To pick up tickets.

Q. How long after you fell, Mrs. Harrington,

(Testimony of Mary Ann Harrington.)

was it when the conductor came through picking up tickets?

A. When you are in pain it seems a long time, but maybe it wasn't. I said to him, "I am hurt and my daughter has got my ticket," and they were both together, and the other one spoke up and said, "I got the tickets going down the aisle."

Q. It is your recollection there were two conductors at the same time? [98]

A. Yes, and he asked for my ticket.

Q. Although you don't know how long it was after the accident when the conductor came, you do know he got there before your daughter came?

A. I know he got there before my daughter came, and I think he got the man that was dressed in gray, some other agent, and they said to me, to those people, "Did you see her fall," and they said, "No."

Q. Wait, Mrs. Harrington, before you go on. I want to get the facts as chronologically as I can. At the time the conductor first arrived and asked for your ticket and before your daughter had come back? A. Yes.

Q. Directing your attention to that time—— (interrupted)

Court: Counsel, it is after five o'clock. Will you have quite some more examination to conduct?

Mr. Pauly: Yes, more, perhaps, than we should try to attempt at this time.

(Testimony of Mary Ann Harrington.)

(Whereupon, the jury was duly admonished, and a recess was taken until 10 o'clock A.M. the following morning, October 20, 1949, at which time, the jury being present and counsel for both parties being present, the following proceedings were had:)

Cross-Examination of Mary Ann Harrington
(Continued)

By Mr. Pauly:

Q. Mrs. Harrington, after you moved into Section 12 from Section 10? [99] A. Yes.

Q. And was seated there, how long was it, if you know, approximately how long was it from that time when you got moved into Section 12 until the accident occurred?

A. I didn't pay any attention to the time. I imagine maybe 15 or 20 minutes, I don't know, maybe not that long.

Q. You had been sitting there some considerable time, in any event, after you had been moved into Section 12 and before you got up to hang the hat up? A. Into 12?

Q. Yes.

A. Yes, I was there some time. I wasn't paying any attention to the time. All I was paying any attention to was I was riding backwards and that I would pick up my hat, hang it up and sit next to the window on the other side. I was facing east and going west.

(Testimony of Mary Ann Harrington.)

Q. You were waiting for the train to stop?

A. Before I hung up my hat.

Q. Your daughter wasn't with you during that time?

A. No, when I sat down from 10 to 12, my daughter—she did stay there until he came back.

Q. During that time you were sitting there waiting for the train to stop, you didn't during that time ring for the porter?

A. No, I didn't. I was just waiting for the train to stop.

Mr. McCaffery, Jr.: We will ask at this time that the [100] answer be stricken and the plaintiff be given an opportunity to interpose an objection to the question.

Court: Very well, what is your objection?

Mr. McCaffery, Jr.: The objection is, it is an attempt on the part of the defendant to establish a part of its defense in plaintiff's case in chief; that the question assumes a state of facts which haven't been shown to exist. There is no evidence before the Court at this time that any porter was in the sleeping car. It is an endeavor to establish the defendant's defense in the plaintiff's case in chief, the defendant's defense of contributory negligence. The issue of whether or not it is to be admitted in evidence hasn't come before the court at this time. When it does, there will be an objection to it.

Court: Overruled.

Mr. Pauly: I take it then, your Honor, that the answer to the question may stand?

(Testimony of Mary Ann Harrington.)

Court: The answer may stand to the question.

Q. You, of course, Mrs. Harrington, know, do you not, that there is a bell in the section that may be used for the purpose of calling a porter?

A. Yes.

Court: Just a minute, now. The Court has ruled just with reference to the particular question as to what she did. Going further in the line you are now pursuing does come within the [101] objection that Mr. McCaffery has made.

Mr. Pauly: May it please the Court, my thought in asking question regarding the bell and the like is prompted with this thought: She testified, I believe, in effect, if my recollection serves me correctly, that after they were moved into Section 12, at which time the porter assisted them, that from that time on, she did not see the porter any further. Now, I believe it proper in that connection, in amplification of that subject, the absence of the porter, to explain the fact that no attempt was made on her part, if it be the fact, to get him.

Court: She has so testified that she did not call the porter.

Mr. Pauly: In amplification of that, I believe it important to determine if she knew of the presence of a bell there, or whether there was a bell there which could be used for the purpose of calling the porter.

Mr. McCaffery, Jr.: There is no establishing of the fact that the bell was in working order, no

(Testimony of Mary Ann Harrington.)

proper foundation made for the introduction of such evidence, and improper cross examination.

Court: Sustained.

Mr. Pauly: So I know how to proceed in the case, do I take it the Court's ruling is I should be precluded at this time from any further questioning on the bell? I am not clear on [102] the question.

Court: The Court can't rule on something that hasn't come before the Court yet. I don't know, there may be some questions which are permissible, but I don't think the question you have just asked comes within proper cross-examination at this time.

Mr. Pauly: As to whether she rang the bell?

Court: No, you asked her that. The Court permitted that answer that she didn't ring the bell or call the porter. Isn't that the question I overruled Mr. McCaffery's objection to?

Mr. Pauly: My question, as I recall, is whether she knew there was a bell there for that purpose. I understand the Court's ruling is that is objectionable.

Mr. McCaffery, Jr.: At this time, if the Court please, we will withdraw the objection and ask that the answer be reinstated.

Court: Very well, that is with reference——

Mr. McCaffery, Jr.: Just that there is a bell there.

Court: That she knew there was a bell there to ring.

(Testimony of Mary Ann Harrington.)

Mr. McCaffery, Jr.: Yes.

Court: Very well, let the answer stand.

Q. Did you make any other attempt to call the porter?

A. No, I didn't make any attempt. In fact, I didn't know where the bell was. It is the first time I rode on the train. [103] I never thought of calling the porter. All I thought of was when the train would stop, I would pick up the hat and hang it up as I had done many times previous on trains.

Q. In riding on trains previously, you knew there was a bell which could be used to call the porter? A. Yes.

Mr. McCaffery, Jr.: We will ask that the answer be stricken.

Court: It may be stricken.

Mr. McCaffery, Jr.: Object to the question as assuming a state of facts not shown to exist by the evidence. What condition she knew to exist in other trains is not pertinent to the condition which existed in the train on which she was riding at that time.

Court: Sustained.

Mr. Pauly: Frankly, I am confused. I want to comply with the Court's orders. If this is—— (interrupted)

Court: You have asked her now with reference to what she knew about conditions in other trains.

Mr. Pauly: Her experience.

(Testimony of Mary Ann Harrington.)

Court: Her experience in other trains with reference to the existence or non-existence of a bell, and the Court has sustained the objection.

Mrs. Harrington, yesterday I asked you to make a picture, Exhibit 1-A, to indicate there the hook on which you intended [104] to hang the hat. In that picture, there is only one pair of hooks shown?

A. Yes.

Q. There may be some confusion in the minds of the Court or the jury or others whether, since there is only one pair of hooks shown in that picture and not the second hook, whether your answer is entirely clear, I don't know. I, therefore, show you another picture marked Exhibit 1-C, which shows one end of Section 12, and in which two separate hooks appear, one toward the window, at which I am now pointing——(interrupted)

A. Yes, that is the one.

Q. And another hook near the aisle but somewhat higher, and ask you will you designate on that picture which hook you were hanging your hat on.

A. On the one near the window. You see, my hat was right here (indicating). I picked it up. I thought I took one or two steps and I tried to hang the hat up. I had my hand like that (indicating) to hang up the hat and the train gave a jerk like that and my two feet went from under me.

Q. I will mark the hook to which she pointed with an "X" and an arrow pointing to it. Did you know approximately how long it was after the

(Testimony of Mary Ann Harrington.)

conductor came to your section following the accident until you went to your berth, that is, the berth was made up and you occupied the berth?

A. I was in too much pain to remember anything like that. I [105] was lying on the sofa in the restroom while it was being made up and I wasn't anxious to even move off the sofa.

Court: The Court is thinking of the evidence that the question you made asked for, to which the Court sustained objection, with reference to her experience on trains generally, and the Court has reconsidered and decided that you may ask that question with reference to her experience on trains and the existence of bells with which to call attendants, so you may ask that question and counsel can raise an objection.

Mr. Pauly: Thank you. You testified previously that before this accident you had ridden on many trains.

A. Many trains for over 40 years.

Q. Do you recall whether on trains that you rode previously was there a bell in the sections by which a person sitting there could summon the porter if they cared to use it?

A. As near as I can remember——(interrupted)

Mr. McCaffery, Jr.: Just a minute, please, Mrs. Harrington. To which the plaintiff objects on the grounds and for the reason that the question isn't sufficiently definite to direct the attention of the witness to whether or not she was riding in coaches,

(Testimony of Mary Ann Harrington.)

tourist sections, Pullman sections, or in which part of the train or what accommodations she had; that under those circumstances it would assume a fact not in evidence; that her experience on other trains would not be a guide to this jury in determining whether or not a bell or signaling [106] system existed in the train upon which she was then riding at the time of the accident; further, there is no foundation laid to show that her act of ringing the bell would have summoned a porter and that a porter was in attendance; further that there is no foundation laid to show that the bell system was in operation at the time and that her attempt to have summoned a porter would have resulted in anyone answering the call; further that the question is directed to an attempt to establish the defendant's defense in the plaintiff's case in chief, and it is improper cross-examination.

Court: The objection is overruled for all parts, except I do think counsel should make a setting with reference to her previous experience on trains of similar character under similar travel conditions, with reference to the type of accommodations.

Q. Let me ask you this then, simply, Mrs. Harrington. Generally speaking and based on your experience in previous railroad travel, while riding in sleeping cars, do you know whether or not, generally speaking, a bell is provided in the section whereby a passenger may summon the porter if they care to? A. Yes, they do.

(Testimony of Mary Ann Harrington.)

Q. In this particular instance, you stated you had never been on this train previously?

A. No. [107]

Q. Did you make any examination to determine whether such a bell existed in this particular section?

A. No, I did not, no, I didn't even think of the bell.

Q. You simply set your mind on waiting until the train stopped? A. Yes.

Q. So you yourself could move your seat?

A. Move the hat and sit near the window and face east instead of riding backwards.

Q. It didn't occur to you to obtain assistance from anyone else, including the porter?

A. No.

Mr. Pauly: That is all.

Mr. McCaffery, Jr.: That is all.

(Witness excused.)

MARJORY HARRINGTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Myers:

Q. State your name, please?

A. Marjory Harrington.

Q. And your residence?

A. 801 West Galena, Butte. [108]

(Testimony of Marjory Harrington.)

Q. What is your occupation?

A Teacher.

Q. Are you related to Mary Ann Harrington, the plaintiff in this case?

A. She is my Mother.

Q. You live with her, do you not?

A. Yes.

Q. Did you accompany Mrs. Harrington on a trip to California in the summer of 1947?

A. I accompanied her from Seattle down and then from California back.

Q. Will you tell the Court and jury briefly what arrangements you made for the tickets and reservations on the return trip?

A. On the return trip, we were in Marysville at the time. I went for reservations for the standard. I had a return trip from Butte here. I was informed there were no reservations opened at that time, so he told me to come back in a day or so; so I went back in a day or two days, and he said there were reservations I could get on the tourist, but I could not get any reservations on the standard. So, I asked when I might have reservations on the tourist. He said it would be one week from then. He said on the standard, I might have to wait for two weeks. I had to return to school, so took the reservations on the tourist, and Mother, I wanted her to remain behind and wait, but in the meantime she had received word my brother-in-law [109] was ill and she decided to accompany

(Testimony of Marjory Harrington.)

me home. He said he could give us reservations only as far as Deer Lodge. I knew by that time we would be up and dressed, so we took the reservations to Deer Lodge.

Q. On the trip, as your train came into Seattle from the south, was it on time?

A. No, our train was late.

Q. Do you know how late it was?

A. I would say from 15 to 20 minutes.

Q. How much time did you have in Seattle?

A. We had approximately, not more than half hour.

Q. What did you do in Seattle?

A. In Seattle we got off the train from California and I went upstairs—Mother accompanied me—to the station, and I purchased her ticket from Seattle to Butte. Then I took her ticket and went to the baggage room and checked a suitcase. I had already checked luggage on my ticket from California. Then, after checking the suitcase, we came down the steps and boarded the train. On the platform was a porter. He took my little overnight case and Mother's small suitcase and brought them into the train. I told him our section was 12. We got in and he said, "You must be mistaken," he said, "12 is occupied."

Mr. Garlington: Just a minute, please. Before your testimony is given here concerning statements made by the porter [110] with respect to the space, we should like an opportunity to state an objection.

Court: Very well.

(Testimony of Marjory Harrington.)

Mr. Garlington: We object to any testimony from this witness concerning statements made by the porter with respect to the ticket space on the train for each of the following reasons: That any statements made by him would be hearsay statements, based upon hearsay if made, that it isn't shown that any statements made by the porter were authorized by the defendant or within the scope of the duty of the porter and that they are not admissions or statements which would be binding upon the defendant; that any such statements are incompetent, irrelevant and immaterial in that they do not establish any breach of any legal duty owing from the defendant to the plaintiff which was or could have been the proximate cause of any injury to the plaintiff, and that any statements by the porter with respect to the contract of carriage and the reservation of seat space would not be the best evidence with respect to that subject.

Court: Sustained. Don't tell what the porter said to you, just what the conditions were that existed.

Q. Miss Harrington, what happened when you boarded the train?

A. When we boarded the train, I also saw Section 12 occupied. The porter, as I say, had our suitcases, so he set my overnight grip down on the seat in Section 10 and he left us then, so I [111] stood in the aisle and waited. Mother sat down in Section 10, and shortly after, when he returned,

(Testimony of Marjory Harrington.)

he removed the people from 12 to the opposite seats. He picked up my suitcase and set it down on the seat which was facing east, which should have been the seat Mother should have occupied.

Q. That is the seat facing forward in the train?

A. Yes. I had my coat over my arm, so I set my coat down. There was—the aisle was crowded, with everyone moving. I had been waiting to go to the rest room. She had a magazine, Mother and I, we had been reading the same story the night before. I handed her the magazine and said, "I am going to the restroom, and I will find a story in the observation car."

Q. When did the train start moving to leave Seattle with reference to these events which you have just described?

A. The train was already moving. That is why I was going to the restroom.

Q. You know of your own knowledge, of your own recollection, that the train was moving?

A. Yes, the train was moving.

Q. Then what happened?

A. I went in the restroom. I was there, I would say, maybe 10 minutes. I walked back to the observation car and picked up two or three magazines. I found one I was looking for and I took it to a seat and sat down and was reading. While I was reading, the two conductors came for the tickets, and I said [112] I was in Car A-16, Section 12 and I had Mother's ticket, so he took the tickets

(Testimony of Marjory Harrington.)

and I continued reading. I was reading but a few minutes and a woman came back and said, "Your mother has had a bad fall. She wants you to come immediately." So, of course, I hurried back to car A-16.

Q. Do you know how long you were gone from the time you left your mother until the time you returned?

A. It may have been 30 minutes, or it could have been 45. I couldn't say how many pages I had read in the book.

Q. What happened when you returned to your mother?

A. When I returned, Mother said, "I have had a terrible fall and my back is hurt," so I said, "Well, Mother, what happened?" She said, "Well"—— (interrupted)

Mr. Garlington: Just a minute. I should like to make another objection at this point with respect to any communication between the plaintiff and her daughter made at the time described by the witness. The objection is that under the facts as shown, statements made by the plaintiff to her daughter would be self-serving declarations, which are not, under the facts shown, part of the res gestae, that they would be simply an unsworn narrative of a past event and would be inadmissible corroboration of the plaintiff's own testimony, who has already appeared on the witness stand, and for those reasons would be incompetent, irrelevant and immaterial.

(Testimony of Marjory Harrington.)

Mr. Myers: If the Court please, it is our contention that [113] the conversation between the witness and her mother as testified to would be admissible as part of the res gestae in that it was but a short time after the accident had occurred, and that it characterized the manner in which the accident had occurred, and in that it took place before there had been time for any thought or any calculation of a story which would be beneficial to the plaintiff; that it is in effect a part of the accident itself, that it speaks as part of the accident, and, therefore, is admissible as part of the res gestae.

Court: The objection is sustained.

Q. How long had you been seated in the observation car before the conductor approached for your ticket?

A. Well, as I say, I was reading, and when you become interested in a story, you don't pay much attention to time. I would say, maybe 20 minutes, as near as I can remember.

Q. How long after that was it you were recalled to return to your mother?

A. Perhaps 10 or 15 minutes.

Q. Do you know how much time had elapsed between the accident to your mother and your return to her?

A. I would say but a very few minutes, because the woman said to me when she saw how badly Mother was injured, that she came back to get me,

(Testimony of Marjory Harrington.)
and when I returned, the suitcase was still on her seat.

Q. How many cars intervened between the observation car and [114] Car A-16 upon which your mother was riding?

A. I would say two or three.

Q. Will you describe your mother's physical appearance when you returned to Section 12?

A. I could tell by the expression on her face she was in great pain, and, of course, her nerves were in bad shape, she was very shaken up.

Q. Where was she seated at that time?

A. She was seated facing west and nothing had been done. The porter hadn't brought her a pillow, he hadn't taken care of the suitcase off the seat, her hat was still there.

Q. Did you have occasion at that time to observe the condition of the flooring within Section 12 between the two facing seats?

A. Yes, I did, because I asked Mother how the accident happened. She said the floor was slippery.

Mr. Garlington: Just a minute. May we renew the same objection as to the statements of the plaintiff to the witness?

Court: Yes, don't tell what your mother said to you, just tell what you saw with reference to the condition existing.

A. Then I looked at the floor. I saw the floor was, I would say, an asphalt tiling, and I noticed down the aisle was carpeting.

(Testimony of Marjory Harrington.)

Q. What was the condition of the asphalt tile as to whether or not it was polished? [115]

Mr. Garlington: Just a minute, now. With respect to that, I desire to register an objection. If it is sought by this testimony to establish some defective condition of the particular area of floor in this seat, that is incompetent, irrelevant and immaterial, because there is nothing in the pleading charging a defect in that condition.

Court: The purpose of it, as I see it, is just to tell what the actual condition was.

Mr. Garlington: As long as we are not enlarging or changing the issue.

Court: I don't see it changes the issue at all, Mr. Garlington. It just tells what the condition of the floor was at that time. Proceed.

A. I saw the type of flooring, and as Mother had stated, the terrible jerk had come which shot her feet out——(interrupted)

Q. Just state the physical condition.

A. Seeing the condition Mother was in, I decided I had better get her berth made up immediately.

Q. Just a minute. Will you repeat the question?

(Question read back by reporter as follows: What was the condition of the asphalt tile as to whether or not it was polished?)

A. I could see it was a slippery floor. Whether or not additional, extra polish had been added, I could not state.

(Testimony of Marjory Harrington.)

Q. Was there a shine to the surface? [116]

A. There was a shine, yes.

Q. Were any train officials around when you returned to your mother?

A. Not when I returned. While I was talking to her, two conductors returned and the Passenger Agent. Mother had already told them she had been injured.

Q. What did these train officials do?

A. They asked for Mother's name, my name, and then they turned to the people on the car and asked if any of the people had seen her fall, and the only person who admitted she had seen her fall was a young child who sat opposite. She said, "Mother, I saw the lady fall. She had her hand up hanging up her hat," she says, "when the train jerked. Then she fell." So the mother said, "Child, you are too young to see that." I asked the lady if she has seen or what her name was, but she didn't state it to me.

Q. What did the officials do after having asked if there were witnesses to the fall?

A. They turned and left the car. They didn't ask if they could be of assistance or whether Mother needed help or not.

Q. What did you do?

A. I rang for the porter. No porter came. I walked down the car looking for him and I didn't see him. I took Mother into the rest room and laid her on the couch. I went again looking for the

(Testimony of Marjory Harrington.)

porter, I rang for him again. When he came, I asked [117] to have the berth made up immediately. I went back into the rest room and told Mother I would get her a cup of tea, I thought tea might help. I went to the club car and had a pot of tea made. I returned to the rest room and helped Mother drink it. By that time she was shaking so she couldn't hold the cup. I held the cup for her, but she couldn't retain the tea, so I checked to see if the berth was ready. When it was ready, I took her back in. I said, "I will undress you now, make you easy." She said, "I am in too much pain, I will lie here." Realizing how badly she was injured, I went again in search of the porter and said, "Will you please go find the conductor and have him check on the train to see if there is a doctor, and if there isn't, to wire to the first station and see that a doctor meets the train." After a while, he returned and said a doctor would meet the train in Spokane, so when the doctor came on the train, I said I wanted Mother removed to a hospital, so he said, he checked her over and couldn't find any broken bones. He said he would give her some sleeping tablets and thought she could go on to Butte. He gave her sleeping tablets, and shortly after she fell asleep. I checked her several times during the night and she seemed to be sleeping every time, so when morning came, I saw she was having difficulty talking, and she said her back was in terrible pain, so I went again to the porter and asked him if he would find

(Testimony of Marjory Harrington.)

the conductor or passenger agent and wire for an ambulance to [118] meet the train in Butte. After a time, he came and said they had wired for a wheel chair, so I said that a wheel chair would not serve, that she was in too much pain and she had to have an ambulance, so after a time he came back and said it was too late to wire for an ambulance, we were not making another stop and that the wheel chair would have to serve. So, when we arrived in Butte, the conductors nor the porter made any effort or offered any assistance to help Mother get off. It so happened that the son of a friend of mine was on his way to West Point, so he came back and assisted me getting Mother off the train on to the wheel chair. At that time the train pulled off giving us barely time to get off the train. So, the boy with the wheel chair wheeled her up to the depot. The one taxi that there was there was occupied and was occupied by a nun. So she said Mother could get into the taxi with her. She got out to help me to assist Mother in. During all this time, no one had come near to ask if they could assist, if she needed anything or how her pain was.

Q. Miss Harrington, during the time that has intervened from your mother's arrival in Butte, August 27, 1947, up to the present time, what has been her condition regarding ability to care for herself?

A. She is unable to care for herself at all. She needs constant care.

(Testimony of Marjory Harrington.)

Q. Is that true at the present time? [119]

A. At the present time she needs care during the day, not at night. After we get her to bed, she doesn't need care during the night. For the first few months we had her at home, she needed care all night long.

Q. At the present time, would you describe briefly the care that is required in the day time?

A. Well, in the morning when she gets up, she dresses herself now, and she is able to come downstairs for breakfast. After she has breakfast, she just sits at the table. We fix breakfast and wait on her. We assist her into the living room where she sits in her chair, and, of course, she is not able to do anything except sit there for the day. She sits there until it is her bedtime, when we assist her upstairs and get her into bed. On Sunday now, she is able to go to church with our assistance. We help her into the car. Most Sundays she can go to church. That is the extent to which we can do anything.

Q. What was her physical condition before the accident?

A. Her physical condition was very fine. In fact, for a woman her age, it was unusual. She had never known sickness and she had always been blessed with good health and had been able to care for herself absolutely.

Q. Did she require any of the care which you have described that you now give her? A. No.

(Testimony of Marjory Harrington.)

Q. Miss Harrington, in regard to financial matters, do you [120] pay bills for your mother and handle financial transactions for her?

A. I paid bills for her from the time of her accident until a few months ago because, of course, she wasn't able to write or read. In fact, she knew nothing of what was going on for many weeks.

Q. Did you have occasion to pay the bills for the hospital?

A. Yes, it was necessary that I pay them.

Q. The nurses had to be paid each week?

A. Yes.

Q. Did you pay the nursing bills also?

A. Yes.

Q. When expenses were necessary such as the purchase of drugs and other incidental expenses to her illness, did you pay those?

A. I paid some of them, and my other sisters paid. It all depended on whoever went to the drug store to pick up the drugs.

Q. Are you familiar with the amount of drugs that were purchased and the approximate cost of those?

A. I know she was given several million units of penicillin. She was given, I think, sulfa; she was given sleeping tablets, she was given liver shots, she was given pills to help her retain food. She couldn't retain any food.

Q. Can you tell us the total expense for medicine and drugs, [121] have you got that?

(Testimony of Marjory Harrington.)

A. The total I paid, I would say, was in the neighborhood of maybe $125 or $150, but what the rest of the family paid, I couldn't say. That doesn't include penicillin, of course, the penicillin was mostly when she was in the hospital.

Mr. Myers: Counsel, have you had an opportunity to examine the checks in connection with the payment of nurses?

Mr. Pauly: No, they were handed to me just before Court.

Mr. Myers: Your Honor, we have a rather extensive series of checks involving the payment of nurses, and if counsel—— (interrupted).

Court: I should think counsel could get together on that matter. I don't think we ought to encumber the record with those.

Mr. Myers: It is our calculation that the total nursing expense was $2,265.05. If you would like to examine those checks.

Mr. Pauly: I don't care to take the time to do that. If counsel has stated they have checked them and it is a correct total, we are willing to accept it.

Mr. Myers: It may be stipulated that $2,265.05 were paid out for nursing care for Mary Ann Harrington in connection with the injury received in the Milwaukee train.

Court: Very well, let the record so show.

Q. Miss Harrington, showing you what has been marked Plaintiff's [122] Exhibit No. 2, will you tell us what that is?

(Testimony of Marjory Harrington.)

A. This covers the hospital bill for the first time, first period Mother was in the Hospital, from the 27th of August to the 27th of November.

Q. What is the amount of that bill?

A. The amount of the bill is $1018.80.

Q. Did you pay that bill? A. Yes.

Q. Did you pay the entire amount of $1018.80?

A. No, I paid $995. There was a discount of $23.80. I asked the girl at the desk what that covered. She said the amount of penicillin that had been given, that was deducted from the cost of it. The cost here is given as $84.00.

Q. In other words, there was a discount given from that total charge for penicillin?

A. Yes, making the bill $995 that I paid.

Q. You paid this how?

A. By check. The check is with the group there on the table, the cancelled check.

Q. Whose money was actually paid?

A. It was Mother's money actually paid.

Q. Showing you what has been marked Plaintiff's Exhibit 2-A, will you tell us what that is?

A. This covers the period the second time Mother had to return to the hospital, which was the 13th of April to the 29th of April. The amount of this is $196.35. [123]

Q. Did you pay this bill? A. Yes.

Q. How did you pay it?

A. I paid it by check also.

Q. Whose money was it you paid?

A. Mother's money.

(Testimony of Marjory Harrington.)

Mr. Garlington: The defendant will stipulate that the hospital care is at a reasonable rate for the period involved in order to avoid the necessity of calling a witness for that purpose.

Court: Very well, will it be stipulated that the amount charged was paid and that it is reasonable?

Mr. Garlington: Yes, your Honor, that is agreeable.

Mr. Myers: May we offer Plaintiff's Exhibit 2 and 2-A in evidence, your Honor?

Mr. Garlington: No objection.

Court: Very well, they will be so admitted.

PLAINTIFF'S EXHIBIT 2

"St. James Hospital Phone 2-1281
"245 Idaho and Silver Streets
Pl Ex #2

Filed Butte, Montana, December 2, 1947
Oct. 25-1949
H. H. Walker, Clerk
By D. F. Holland, Deputy

Miss Marjorie Harrington
801 West Galena
City

"Account of Mrs. Mary Ann Harrington:

Date	Items	Debit	Credit	Balance
8/27/47	Bill rendered			
to	Room and Care	819.00		
11/26/47	Operating Room			
	Anesthetic		Paid in Full	
	Laboratory	42.00	12-9-47	
	X-Ray	15.00	St. James Hospital	
	Drugs & Dressings	31.80	McNulty.	
	Penicillin:	84.00		
	Intravenous:	27.00		
	Phone Service			
		$1018.80	%$23.80	$995.00"

(Testimony of Marjory Harrington.)

PLAINTIFF'S EXHIBIT 2-A

"St. James Hospital Phone 2-1281
Idaho and Silver Streets

Pl Ex #2A
#245
Filed Oct. 25, 1949
H. H. Walker, Clerk
By D. F. Holland, Deputy

Butte, Montana, May 3, 1948

Mrs. Mary A. Harrington

801 W. Galena
City

Date	Items	Debit	Credit	Balance
4/13/48	Bill Rendered			
to	Room and Care	128.00		
4/29/48	Operating Room			
	Intravenous	11.00		
	Laboratory	11.00		
	Duracillin	42.00		
	Drugs	1.35		
	Oxygen	3.00		
	Phone Service			
		$196.35	196.35	.....

We were not sure whether or not we had mailed this."

Q. (By Mr. Myers): Returning to the stopover in Seattle on your trip from California, you have testified, I believe, that [125] you purchased a ticket from Seattle to Butte for your mother in the Seattle depot, is that correct? A. Yes.

Q. Was there a line at the ticket window?

A. There were, I would say, maybe three or four ahead of me, and then when I went to the baggage room, there were also three or four in line in the baggage room.

(Testimony of Marjory Harrington.)

Q. When you went to board the train, did the porter ask to see your sleeping car accommodations?

A. No, I noticed A-16 on the window, so I stopped and he asked me what my seat was. I said it was section 12.

Q. After you found Section 12 occupied by other people, did you show your ticket to the porter?

A. Yes, I did.

Q. It was for Section 12, the section which was occupied at that time? A. Section 12, yes.

Mr. Myers: You may cross-examine.

Cross-Examination

By Mr. Pauly:

Q. At the time you boarded the train, Miss Harrington, did you have one or two pieces of luggage?

A. I had a light grip of Mother's and then a small overnight case of mine. [126]

Q. There were two pieces? A. Yes.

Q. And did you have any assistance by a Red Cap in going from the station to the car?

A. I don't believe so. We were in a hurry to get on the car, and, as I say, I had been in the baggage room and just hurried down the steps to make the train.

Q. You checked some luggage in the baggage room? A. In Seattle, yes.

Q. How many pieces? A. One piece.

Q. You got off the California train with three pieces of luggage, then checked one in the Seattle station and boarded this train with two pieces?

(Testimony of Marjory Harrington.)

A. Yes.

Q. One of which was an ordinary suit case?

A. Yes.

Q. The other, a smaller overnight bag?

A. Yes.

Q. Approximately what would be the dimensions of the overnight bag?

A. I would say twelve by eight by twelve.

Q. Twelve inches wide, twelve inches high, and eight inches from front to back? A. Yes.

Q. The porter assisted you in getting on the train? A. Yes.

Q. He took your luggage? A. Yes.

Q. Both pieces? A. Yes.

Q. And you testified that due to the fact that Section 12 was occupied by a lady and two children—— A. Yes.

Q. ——you then waited in another section?

A. Mother sat; I stood in the aisle and waited for the porter to return, or the conductor, to give us our proper seats.

Q. What section was that, do you recall?

A. Ten.

Q. Where was it located with respect to Section 12? A. Directly behind Section 12.

Q. On the same side of the aisle? A. Yes.

Q. Were there other people in Section 10?

A. No.

Q. It was entirely empty? A. Yes.

Q. But when your Mother sat down, you stood in the aisle? A. Yes.

(Testimony of Marjory Harrington.)

Q. How long was it then, if you know, from the time your [128] mother and you first arrived and she sat in Section 10 until you were moved into Section 12?

A. I would say it was a matter of, maybe, not more than five minutes, because it was train time and I just stood, knowing we would be pulling out.

Q. Although the rest of Section 10 was empty?

A. Yes.

Q. At least nobody was sitting in there at the time? A. No.

Q. The porter came back and put you into Section 12? A. Yes.

Q. Do you know whether the train was then moving, or not? A. Yes, it was.

Q. It was leaving Seattle? A. Yes.

Q. It left Seattle on time, did it?

A. I believe so.

Q. Do you know the time yourself?

A. I believe it was 2:45.

Q. In the afternoon? A. Yes.

Q. Where did the porter put the suitcase, if you know, when you first went in?

A. He set it on the seat in Section 10.

Q. The suitcase, as distinguished from the overnight bag? [129]

A. The suitcase—I noticed the overnight case because I saw it was on the seat. The suitcase I didn't pay any attention to because I had given it to him and knew he would take care of it.

(Testimony of Marjory Harrington.)

Q. You don't know where he put it?

A. No.

Q. Did you carry your own coat?

A. I carried my coat. Mother still was wearing her coat.

Q. Then, in moving to Section 12—do you know where the people went who were, as you say, occupying 12 when you arrived?

A. They went directly opposite us, directly opposite Section 12.

Q. How many of them? Were they men, women or children?

A. No, a woman with two children, children I would say, perhaps, one maybe four and the other six, or maybe five and seven.

Q. Boys or girls? A. Girls.

Q. Both girls? A. Yes.

Q. In making the move of the lady and two children from your Section 12 across the aisle, do you know whether any luggage was moved?

A. No, I didn't pay any attention to that. [130]

Q. Do you know whether any coats were moved?

A. No.

Q. All you knew was the lady and children got out of there and sat in the section across the aisle?

A. Yes. I know we had been told that was occupied.

Q. I am not asking you what you had been told by anyone, just what you did. Did the porter then assist you and your mother in going from Section 10 to 12?

(Testimony of Marjory Harrington.)

A. He picked up the suitcase or overnight case that was on the seat and placed it on the seat in Section 12.

Q. Would that be the seat in Section 12 which was nearest to Section 10 or farthest away from Section 10?

A. Farthest seat, the seat facing east.

Q. Section 12 and Section 14 are adjacent one to the other?

A. Yes, no, 11 I would say, or 12.

Q. Withdraw that, I am confusing everyone here by referring to the wrong numbers. Section 12 and 10 are adjacent? A. Yes.

Q. In moving the overnight bag, the small one, and in putting that in Section 12, do you know whether it was placed on the seat nearest to Section 10 or farthest away from 10?

A. Farthest away.

Q. It was placed farthest away from Section 10?

A. Yes.

Q. Did your mother sit down in Section 12?

A. Yes.

Q. In what seat?

A. The seat closest to Section 10.

Q. The seat closest to Section 10? A. Yes.

Q. Those facts are clear in your mind?

A. Yes.

Q. Where were your coats placed?

A. Well, as I say, I put my coat on top of the overnight case.

(Testimony of Marjory Harrington.)

Q. The coats would also be on the seat in Section 12 farthest away from Section 10? A. Yes.

Q. You yourself, did you sit down in Section 10 or Section 12? A. No.

Q. You left immediately after your mother was seated? A. Yes, sir.

Q. So you never had sat down in Section 10 or 12? A. No.

Q. As a matter of fact, you hadn't sat down in the car? A. No.

Q. When you left, the train was in motion?

A. Yes.

Q. You first went to the ladies' rest room?

A. Yes.

Q. In that car? [132] A. Yes.

Q. Do you know which end of the car it was in?

A. It was the end closest to our seats, I believe.

Q. The end closest to your seats?

A. I believe, if I recall correctly.

Q. That is your recollection, at least?

A. That is my recollection.

Q. You are not positive as to that?

A. No, I am not.

Q. Was the ladies' rest room unlocked at that time? A. Yes.

Q. And available for use? A. Yes.

Q. You spent some time there?

A. Yes, I would say 10 minutes.

Q. Then I understood you left that car and went to some other car?

(Testimony of Marjory Harrington.)

A. Yes, I went then to the observation car.

Q. By the observation car do you mean the car at the extreme rear of the train, or the club car?

A. No, the observation car at the rear end of the train.

Q. At the rear end of the train? A. Yes.

Q. After you left the rest room in the car before you went to the observation car, did you return to Section 12 to see how [133] your mother might be located?

A. No, because I knew Mother was capable of taking care of herself. As I say, I thought the porter would get her placed and get her a pillow because the porter was there when I left. When I returned, nothing had been done.

Q. You yourself made no effort to see she had been properly established?

Mr. McCaffery, Jr.: Objected to as not proper cross-examination.

Court: Sustained.

Q. In going from the observation car to the rest-room, did you pass your mother's section?

A. No.

Q. And approximately how many cars did you go through in passing from 16 to the observation car?

A. It might have been three or it might have been two.

Q. Three or two? A. Yes.

Q. Were they sleepers?

(Testimony of Marjory Harrington.)

A. I believe one was the club car and I believe one or two were sleepers.

Q. One was a club car? A. Yes.

Q. Were was that located with respect to car 16 or A, if you know? [134]

A. I couldn't say if it was the next car or if there was a car between.

Q. It is your recollection it was between car A and the other car? A. Yes.

Court: Car A-16.

Mr. Pauly: To avoid confusion, 16 was merely another additional number to designate the train, Train No. 16. Car A or Car B, Train 16. Sixteen designates the train.

Q. It is your recollection that the club car was between car A and the observation car?

A. I believe so.

Q. What were the other coaches that you passed through, if you recall?

A. They were sleeping cars.

Q. Did you pass through a diner? A. No.

Q. You did not? A. No.

Q. Now, to make one thing clear as to this time element, I understood you to say that you had been reading? A. Yes.

Q. It was approximately 20 minutes between the time when you got to the observation car and the time when the conductor picked up your tickets?

A. Yes.

Q. You had previously spent some 10 minutes or more in the restroom of the car? A. Yes.

(Testimony of Marjory Harrington.)

Q. So that would be approximately a half hour from the time you left your mother and the conductor picked up the ticket? A. Yes.

Q. Then, it was some 10 or 15 minutes after the conductor picked up the tickets you say the lady came?

A. I wouldn't be positive, because as I say, when you are reading a book, you aren't conscious of anything else but the book in front of you.

Q. You spent all that time in the observation car reading? A. Yes.

Q. Do you know the lady that came back?

A. No. I just had noticed her. She was occupying our section when we got on.

Q. It was the same lady?

A. The same lady, yes.

Q. After you returned to car A and Section 12 where your mother was then seated, was she seated in the same seat where you left her? A. Yes.

Q. Was the conductor there at that time?

A. He came almost immediately, I think, while Mother was telling [136] me of her accident.

Q. From what direction, do you know?

A. I couldn't say, no, I was too interested in listening to Mother.

Q. One or two men?

A. Two conductors and the passenger agent.

Q. Three men? A. Yes.

Q. No porter? A. No.

(Testimony of Marjory Harrington.)

Q. Did you pass the porter in going from the observation car to your mother's car?

A. No, I did not.

Q. After the conductors arrived there in Section 12 following the accident, how long were they there, do you know before leaving?

A. Do you mean how long were they talking there to me?

Q. Yes.

A. Not more than five minutes at the most, just took Mother's name and address and my name, and turned to the other passengers and asked if any of them had seen her fall. There were few people on the car even though we had difficulty getting reservations.

Q. Other people on the car?

A. Not very many. [137]

Q. There were not very many in the car?

A. No.

Q. Do you have any idea how many?

A. I wouldn't say there were more than a half-dozen. There was a man and woman in Section 9 who could have seen her fall. Evidently they were the ones who helped pick her up.

Q. You weren't there, of course? A. No.

Q. You didn't see the accident at all?

A. But I asked them if they had seen her fall, and they said—— (interrupted).

Q. I don't care what they may have said. Thank you. That is all.

(Testimony of Marjory Harrington.)

Redirect Examination

By Mr. Myers:

Q. Miss Harrington, you have testified that the porter moved the overnight bag from the adjoining section in which your mother was seated and by which you were waiting? A. Yes.

Q. To the seat in Section 12 furthest away from that adjoining section? A. Yes.

Q. Was this seat in Section 12 to which the overnight bag was moved facing in the same direction the car was going? [138] A. Yes.

Q. Or facing away?

A. Facing the same direction. It was facing east.

Q. In direct and cross-examination you have given various measurements of time as to the time you spent in the rest room and in the observation car? A. Yes.

Q. Were they accurate measurements of these times?

A. No, I did not have my watch with me. I think Mother's watch, the night before it wasn't running right or something, she had put that in her pocketbook.

Q. They were general estimations of time, is that correct? A. Yes.

Mr. Myers: That is all.

(Witness excused.)

(Five-minute recess.)

Mr. McCaffery, Jr.: I would like to recall Dr. Kane at this time for a question or two I forgot to ask on direct examination.

Court: Very well.

P. E. KANE

recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Doctor, you are the same witness who testified yesterday afternoon on behalf of the plaintiff?

A. Yes.

Q. You were sworn at that time?

A. Yes, sir.

Q. Doctor, handing you Plaintiff's Exhibit Number 1, that is the X-ray plate which you testified you had prepared under your direction?

A. Yes, sir.

Q. Doctor, I forgot to ask you yesterday, could you demonstrate to the jury the position of the stone in the kidney from that X-ray plate?

A. Of course, on reading plates, there is just shadows, but here it is on this side here, this area in here (indicating). It is opaque, something like a bone right at the pelvis shown on this side here. You can compare it. There is no such mass on the left side whatsoever. The outline of that is up that way and down (indicating).

Q. And, Doctor, what is the position of the stone in the kidney? Could you describe whether it is at

(Testimony of P. E. Kane.)

the top or bottom or the opening of the pelvis sac?

A. It is in the pelvis of the kidney. Taking the kidney from top to bottom, it would be about the middle in comparison with [140] the kidney, that is, on the edge.

Q. Doctor, when that condition is found to exist, what is the customary care required? Is surgery indicated? A. Yes.

Q. If surgery is impossible or cannot be resorted to, Doctor, what is the usual result where a stone is permitted to remain in the, what you refer to it, the pelvis of the kidney?

A. It will impinge upon it, the kidney substance in time, and tend to destroy it as time goes on.

Mr. McCaffery, Jr.: That is all. Thank you, Doctor.

Cross-Examination

By Mr. Pauly:

Q. That is assuming it continues to grow and is of sufficient size? A. Yes, sir.

Q. Otherwise, it might be present and if it becomes dormant, it might never cause any difficulty?

A. That's right.

Court: What is the size of the stone now with relation to the pelvis sac?

A. I would say it pretty nearly fills it at the present time, comparing the shadow with the size of the normal pelvis of the kidney.

Mr. Pauly: That is all.

(Witness excused.) [141]

NORMAN HAMILL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCaffery, Jr.:

Q. Mr. Hamill, would you please state your name? A. Norman Hamill.

Q. What is your business or occupation?

A. I am an architect.

Q. Where did you receive your college education? A. Montana State College.

Q. Did you receive a degree at the end of your college work? A. Yes.

Q. What was that degree?

A. Bachelor of Science in Architecture.

Q. As an architect, Mr. Hamill, do you have occasion to pass upon the suitability of materials for use in structures? A. Yes.

Q. Among such materials, do you have occasions to pass upon the placement of rugs and asphalt tile and other materials in places occupied by the public? A. Yes.

Q. How long have you been in the practice of your profession, Mr. Hamill?

A. Oh, about 15 years, 16 years. [142]

Q. You were duly licensed in the State of Montana as an architect? A. Yes, 1935.

Q. At this time you hold your license?

A. Yes.

Q. Mr. Hamill, would you be able to express an

(Testimony of Norman Hamill.)

opinion as to the footing given by a heavy rug, wool rug, contrasted with the footing given by asphalt tile?

Mr. Garlington: Just a minute, your Honor, I should like at this time to enter an objection to this testimony for the following reasons: that it is incompetent, irrelevant and immaterial; that there is neither an allegation nor any evidence that the floor condition of the car in question was the proximate cause of plaintiff's injury. May I interrupt here? I assume this evidence is offered in connection with the condition of the Car A-16, is that right?

Mr. McCaffery, Jr.: That is correct, it is proposed to be offered.

Mr. Garlington: Further that a failure to provide adequate facilities for the accommodation of hats and coats of passengers is not a reasonably foreseeable cause of physical injury to passengers, particularly when adequate porter service is available; that there is neither an allegation nor evidence in this case to sustain an attack on the design, planning and construction of the Touralux car such as A-16, such matters [143] not being subject to a review by a jury; that the evidence with respect to the design, planning and construction of such cars can be furnished only by expert opinion evidence of those qualified in that field. There is no foundation laid here showing that the witness of whom the question is asked is qualified as an expert in that field, and there is insufficient foundation of fact laid

(Testimony of Norman Hamill.)

for the opinion which it is sought to be obtained from this witness.

Mr. McCaffery, Jr.: We believe, if the Court please, that the allegations of the complaint and the evidence which has been received in court without objection has definitely established a condition upon which we think the jury should be provided with some expert testimony, in connection with the security of the footing provided by the defendant in places where it should have anticipated that persons might be in the act of hanging up coats when sudden movements of the car would take place; that they have failed to exercise the highest degree of care. The only question in my mind as to the admissibility of such evidence is as to whether or not it wouldn't be within the common knowledge of all jurors, and whether or not expert testimony is required upon the points.

Court: Counsel seems to have made no objection upon that ground as I understand the objection.

Mr. Garlington: Our objection is based upon the fact that, as we understand the issues in this case, your Honor, the complaint [144] alleges and evidence was offered to prove that the planning, design and furnishing of the car is faulty in that it does not provide adequate and safe facilities or accommodations for the hats and coats of passengers on the car. Our position is that we are at a loss—an attack of that kind upon the problem of railroad engineering, planning and design may not be made

(Testimony of Norman Hamill.)

in court subject to a review by the jury as to the adequacy of those facilities, and that would be true, your Honor, whether the testimony on behalf of the plaintiff is supported by the opinion such as called for from this witness, or whether it is based on the simple facts as they already appear from the description of the area, that there was a floor, part of which was carpeted and part of which was not. Our objection is to the attack on the design and planning of the car.

Court: Well, it isn't an attack upon the design and planning of the car, as I see it. The purpose of the testimony is to elicit testimony as to the nature and safety of the flooring furnished, is that it?

Mr. McCaffery, Jr.: That is our attempt, your Honor.

Mr. Garlington: That we consider to be an attack on the design and planning of the car because there is no contention that the Touralux car was not in the designed and planned condition. In other words, there is no testimony here that this particular bit of flooring in Section 12 was in bad order, or [145] out of the condition which was prevailing throughout the car.

Court: I think I will have a discussion with counsel on this point.

(The jury was admonished at this point and left the courtroom, and in the absence of the jury, argument was had upon the objection.

(Testimony of Norman Hamill.)

(Thereafter, a recess was taken until 2:00 o'clock, p.m., same day, October 20, 1949, at which time the following proceedings were had, still in the absence of the jury:)

Court: I think upon proper objection, I will sustain an objection to the offering of expert opinion in the matter at all, but not upon the basis you have suggested, but rather that this is not a matter subject to expert opinion, that the jury is just as well qualified as anyone else to find whether or not the footing was safe, whether negligence existed under the circumstances, as well qualified as an expert. We are all too familiar with our own experience as to that. It is something we are aware of every day in our own experience, and the jury too. So, if the defendant will make an objection to that testimony based upon that basis, I will sustain such an objection.

Mr. Garlington: Before I do that, your Honor, may I ask—I would not like to waive the objection to the submission of that issue to the jury by making objection to the admission of expert evidence on the point.

Court: Oh, of course not. Your objection will stand. The objection you have made stands, and I will sustain it only [146] upon the basis that expert opinion is not admissible in this particular matter.

Mr. Garlington: Then, let the record show that without prejudice to the objection heretofore made by the defendant to the admissibility of evidence on

(Testimony of Norman Hamill.)

this subject, the defendant now has the opportunity to make an additional objection to the introduction of any expert opinion evidence on the issue of the condition of the floor for the reason and on the ground that such is not a proper subject of expert opinion evidence.

Court: Very well, the Court will sustain the objection on that basis, on the basis it is not proper subject for opinion evidence.

Mr. Pauly: And overrule it as to the balance, your Honor?

Court: It isn't necessary to overrule it. I am just advising you what my position is. I am sustaining it upon that basis alone. As the matter moves along, make your proper objection at any time, but I am just advising you about my position in the matter.

Mr. McCaffery, Jr.: At this time may the witness Mr. Hamill be permanently excused.

Court: Yes.

(Witness excused.)

Mr. Caffery, Jr.: Further, the plaintiff rests his case at this time. Before resting, we would like to make a motion in conformity with Rule 15(b) of the Code of Civil [147] Procedure as to amendments to conform to the evidence, and I thought, perhaps, it might be better to do so in the absence of the jury.

Court: Very well.

Mr. McCaffery, Jr.: The plaintiff proposes that her complaint be amended to conform to the evidence as produced upon the plaintiff's case, and particularly that Paragraph 4 of plaintiff's complaint include the following allegation of negligence as proved by the evidence and be designated as paragraph (e).

Court: Paragraph (e), following the enumeration.

Mr. McCaffery, Jr.: Following the enumeration of issues of negligence.

Court: On page 4, yes, I see.

Mr. McCaffery, Jr.: As follows: That the defendant, in the exercise of the highest degree of care knew, or should have known, that injuries were liable to be sustained by passengers, and particularly this plaintiff, because of the insecure footing provided by the defendant in its Touralux coaches in those portions thereof covered by a hard surface composition, namely, that portion between the seats provided for occupancy of passengers and particularly should have anticipated injuries to a passenger standing upon such hard surfaced material when the train lurched, swayed, or gave an unusual, unexpected or violent jerk. Secondly, that the complaint in paragraph 5, covering [148] the injuries received by the plaintiff, be amended to include subsections (h) and (j), as follows: (h), an infection of the pelvis of the kidneys; (j) a calcification in the pelvis of the right kidney, resulting in a kidney stone of large size. I believe that is the amendments

at this time that we have to conform to the evidence procuded at the trial of this cause.

Mr. Garlington: Defendant would like to be informed now whether this amendment is intended to eliminate from the further issues in the case allegations of negligence in paragraph 4 on which there has not been any evidence up to this point. I refer particularly to paragraph 4 (a), concerning duplication of space and paragraph 4 (c) concerning the public address system.

Mr. McCaffery, Jr.: No proof having been adduced at the trial as to the allegations contained in paragraph 4(c) relative to a public address system, the plaintiff, as to that portion thereof charging negligence in failing to warn the plaintiff, although the car in which the plaintiff was riding was equipped with a public address system provided for such purpose, is abandoned by the plaintiff, but as to that portion of paragraph (c) containing an allegation that there was a failure to notify or warn the passengers and particularly this plaintiff that the train was about to start, we still contend that proof has been made by the testimony of the plaintiff on direct examination [149] when she stated that no person, conductor, porter, or otherwise, warned her that the train was about to start. Is that in answer to your question, Jim? As to paragraph (a), we still rely and contend that proof of occupancy and inability to occupy the section for which she had contracted with the defendant company has been made, and that that may be an issue of con-

curring negligence and negligence contributing to the plaintiff's injury under the theory of causation. Further, that the proposed amendment does not, in any way, other than herein stated, abandon any of the other designated grounds of negligence contained in the complaint.

Mr. Garlington: The defendant objects to the amendment of the plaintiff's complaint at the close of the plaintiff's case by including a general allegation dictated into the record as paragraph 4(e) for the reason that it enlarges the issues in the complaint and leaves the defendant without opportunity to produce adequate testimony to meet that issue, the enlargement being that in the original complaint, by paragraph 4(d), the allegation was that the defendant failed to provide proper facilities for the accommodation of the plaintiff's hat and coat, and our proof has been formed around meeting that sort of a contention. Now, a new issue is injected as to why, if at all, the hard surfaced composition floor is provided in the Touralux coaches, and whether on that issue injury should have been anticipated, and that it may, perhaps, be evidence of a [150] violation of the duty owed to the plaintiff without any opportunity to consider it or to assemble evidence on that issue. The defendant objects that the amendment comes too late and for that reason should be not allowed.

Court: Mr. Garlington, doesn't subsection 2 of section (d) set forth the slippery and unsafe condition of the floor?

Mr. Garlington: It does, but it relates it and confines it to the business of providing for the accommodation of hats and coats, and it was our view that, frankly, that issue wasn't sound as a matter of law, and we proposed to base our defense, or, I should say, risk our defense on that proposition. Now, when the whole field of what kind of flooring should be had in a car of this type is opened up, just at the close of the plaintiff's case and when we have but a few hours within which to put in ours, it leaves us in a very difficult position.

Court: What was your position with reference to the allegation that was originally in the complaint?

Mr. Garlington: Our position with respect to that was that negligence in failing to provide for accommodation of hats and coats just couldn't have been the proximate cause of this injury. In other words, that failure to provide some sort of accommodations for hats and coats did not have a reasonably foreseeable consequence that it might result in physical injury to passengers under conditions as they are in that train. I still think that is the law, and the floor was just related to [151] hats and coats, and I frankly——(interrupted).

Court: Of course, it was related as concurrent negligence, wasn't it. Doesn't the allegation make it a concurring act of negligence? And any one of the concurring acts is negligence.

Mr. Garlington: I don't so interpret the complaint.

Court: I think it is sufficient, enough to put you on guard. It may be it couldn't have been submitted to the jury on that point under the pleading at this point without amendment, but surely it was sufficient to put you on guard as to the proposition. Of course, I take that attitude because I, in my own mind, just looked at it and thought it was a slippery floor case.

Mr. Garlington: We looked at it carefully. This is done with obvious—the paragraph enumerates classifications (a), (b), (c), (d), then under (d), which is the paragraph we are discussing, there are two subdivisions, which in any arrangement or analysis revert back to (d), so we thought that was the issue we were going to face. As I say, we thought we could take that one on the law rather than try to produce evidence with respect to it.

Court: Doesn't that paragraph allege there was negligence in the failure to provide facilities to hang hats and coats, then doesn't it also allege there was negligence in furnishing a slippery floor? [152]

Mr. Garlington: I don't think so, your Honor, because it says defendant didn't provide for hats and coats because of the following defects, one and two. That is the frame work of it.

Court: It says the facilities were inadequate and unsafe, the facilities furnished for the hanging of hats and coats were inadequate and unsafe because the floor was slippery? That is what it amounts to, doesn't it?

Mr. Garlington: I don't think so, your Honor,

I think it says we were negligent in failing to provide proper facilities for the accommodation of the hats and coats, and we knew, or should have known that the facilities so provided—that means for hats and coats, as I understand—were inadequate and unsafe because—were in an unsafe condition to be used while the train was in motion or being put in motion because of the following defects, all relating to hats and coats.

Court: It alleges the facilities furnished were inadequate to be used because the floor was slippery. Now, surely that was enough. What is your position now, though, accepting your statement that you were not advised, didn't feel that this was a question to be considered, what can you do to proceed with the trial within any reasonable time now?

Mr. Garlington: I don't know. The office of the railroad that would have to do with these things is, of course, in Chicago. If the interpretation of paragraph (d) is as your [153] Honor indicates, then there is just no need to include a paragraph (e) because (e) is included in (d).

Court: My offhand opinion was that it is. I don't know that the amendment was necessary.

Mr. McCaffery, Jr.: May I state the position of the plaintiff in connection with it? It was our interpretation of the drafting of the complaint that previously in paragraph 4, in describing the activities which had taken place, we have alleged that "and while in the act of hanging up her hat, the train upon which the plaintiff was riding was violently

and suddenly jerked and put into motion by the employees of the defendant without any notice or warning whatsoever." Now, continuing on down, the complaint states that the negligent acts and omissions of the defendant corporation, its servants and employees, which proximately caused the plaintiff's injuries were as follows. Under any interpretation, the allegation of the motion of the train was an allegation of a contributing cause, and the proof has so developed that we now believe that the contributing cause has become a concurring and proximate cause from the evidence adduced at the trial. There is no question of lack of notice on the part of the defendant. The complaint actually puts them on notice that the train was suddenly started, put into motion with a sudden, unusual jerk. That is alleged as a contributing cause. Where are they taken by surprise from changing a contributing cause to a proximate [154] cause as it developed by the evidence adduced at the trial?

Court: I don't see it. I think the unusual jerk or whatever words are used to allege the movement, and the failure to provide adequate facilities for hanging hats and the slippery condition of the floor, the slippery floor that was furnished, are all each contributing or concurrent acts of negligence, and any one of them is sufficient. I think, don't you find, Mr. Garlington, that the allegation with reference to the slippery condition of the floor—what did you have in mind when you read that?

Mr. Garlington: We had in mind it related back

to the business of hats and coats and raised the problem of foreseeability and proximate cause.

Court: The slippery floor didn't have anything to do with whether or not facilities were provided for the hanging of hats and coats, but surely the slippery floor had something to do under the allegations with whether or not the facilities furnished for hanging hats and coats were adequate and safe, considering where they were located and the fact you would have to use the slippery floor to reach them. Wouldn't that be a part of the whole picture as you would get it? In other words, it is alleged it was unsafe because you had to stand on the slippery floor to hang hats and coats.

Mr. Garlington: We may not have interpreted it correctly.

Court: Looking at it now, do you see it. [155]

Mr. Garlington: I see there can be made a connection now.

Court: I appreciate your position, too.

Mr. Garlington: I think that elevates what seemed to be one of the minor allegations of negligence to one of major importance on its own.

Court: Yes, separately. What can we do now to assist you? Can we adjourn for the rest of the day?

Mr. Garlington: I think we might as well go ahead and complete as much of the case as we can this afternoon and we will undertake in the meanwhile to see what can be done to remedy our situation and then take it up with the Court in the morning.

Court: Very well, call in the jury. Did I grant leave to make the amendment? Leave is granted to make the amendment offered.

(Jury returns to the Courtroom.)

Court: Do you wish to make a statement? [156]

* * *

DONALD H. CAMPBELL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. Donald H. Campbell.

Q. Where do you live?

A. Seattle, Washington.

Q. Are you employed by the Milwaukee Railroad? A. Yes, I am.

Q. In what capacity?

A. Chief Clerk, Reservation Bureau.

Q. At what points are you so employed?

A. I don't understand.

Q. In what city?

A. In Seattle, Washington.

Q. In the Seattle office of the Milwaukee Railroad? A. That's right.

Q. Will you please tell us in general what is the Reservation Bureau?

A. The Reservation Bureau is a private office run under the jurisdiction of the City Ticket Office,

(Testimony of Donald H. Campbell.)

and we are engaged in making reservations by wire and by phone.

Q. For sleeping accommodations? [159]

A. Sleeping accommodations and coach.

Q. And coach accommodations as well?

A. That's right.

Q. In that service, do you handle the assignment of Pullman space and tourist space together?

A. Yes, we do.

Q. Is it a fact, Mr. Campbell, that on any train and on Train 16, that some space in each car may be assigned specifically to various points?

A. That's right.

Q. And it is sold by those stations without checking with you?

A. That's right. That is their permanently assigned space.

Q. Would the Seattle office sell that space so assigned specifically to a station? A. No.

Q. But as to all unassigned space, the reservations are handled through your office?

A. That's right.

Q. As Chief Clerk in the Reservation Bureau, do you have general supervision over such Reservation Bureau? A. Yes, I do.

Q. Now, let me ask you, were you acting as such Chief Clerk in August, 1947? A. I was. [160]

Q. And as such, did you have supervision over assigning space in Touralux car A-16, leaving Seattle on August 26, 1947?

(Testimony of Donald H. Campbell.)

A. Yes, that's right.

Q. I see you have available there with you certain documents? A. That's right.

Q. Will you tell me, are they documents from your office? A. That's right.

Q. Constituting part of your official records?

A. That's right.

Q. Will you tell us, either relying on your own personal recollection, or those documents, official records, so far as you have to, what if any sale was made of Section 12 in Car A leaving Seattle on Train 16, August 26, 1947?

A. To begin at the beginning, on August 13th, we received a wire from our agent at Deer Lodge, Montana, requesting space on Deer Lodge to Chicago.

Q. Excuse me for interrupting. What do you mean, "on Deer Lodge to Chicago"?

A. The space was requested for the party to get on at Deer Lodge and go to Chicago, and we assigned by wire lower 12, Car A-16. On August 19th, we received a Western Union wire from our agent, Mr. A. Tansley, at San Francisco, at the request of the Southern Pacific Agent at Marysville, for space on Seattle to Butte. Inasmuch as at that time lower 12 had been assigned on Deer Lodge and was the only space available, [161] we assigned to our agent, Mr. Tansley Section 12, Car A-16, to Deer Lodge only, under his Code VH 554. On August 20th, we received a wire from our agent at Deer Lodge—— (interrupted).

(Testimony of Donald H. Campbell.)

Q. Let me interrupt at that point. Section 12, as I understand, had been sold then to the agent in San Francisco? A. That's right.

Q. For use from Seattle to Deer Lodge, and from Deer Lodge on, to another party for occupancy on Deer Lodge to Chicago?

A. That's right. On August 20th, we received another wire from our agent at Deer Lodge, requesting that we cancel the space assigned him on Deer Lodge to Chicago, which we did. This left the space open from Deer Lodge on. Sometime after that, the space was re-assigned on Three Forks under Ticket 1034 to Chicago.

Q. The assignment was made to Agent Tansley, was it? A. Yes.

Q. In San Francisco, for occupancy from Seattle to Deer Lodge. Do you know if that was intended for sale to someone at Marysville, California?

A. I would know by the code number because each office has its own separate code letters. If I didn't know it from memory, I could check it.

Q. Do you know it from memory?

A. Yes, in this case.

Q. What is it? [162]

A. VH is the code at Marysville.

Q. That space was later picked up and definitely sold to Marysville from Seattle to Deer Lodge?

A. When that code number, the VH 554, when they inserted that code number in the diagram, then it is, it is sold.

Q. Was any other sale made of Section 12 on

(Testimony of Donald H. Campbell.)

that train for that day between Seattle and Deer Lodge?

Mr. McCaffery, Jr.: Just a minute, to which we will object on the ground and for the reason it is calling for a conclusion of the witness; there is no showing, no proper foundation laid or no showing made that this witness is in complete charge, or knows of his own knowledge that a sale has not been made or was not made by a conductor on the station or on the platform. The evidence is self-serving, it is based upon what the witness has described as the custom of the railroads in the sale and distribution of tickets; for the further ground and for the further reason that the basis for his answer is hearsay; that none of the telegrams which are purported to have been received have been produced in evidnce as the best evidence, although objection was not made at the time by the plaintiff.

Mr. Pauly: If I may interrupt. To shorten matters, I intend to withdraw the question to save time going on with the objection.

Mr. McCaffery, Jr.: All right. [163]

Q. So far as your office is concerned, Mr. Campbell, can you tell us whether or not any other sale of Section 12 on that particular train for that day was made leaving Seattle?

A. So far as our office is concerned, no, there was no other sale.

Q. Is it possible—I am not asking you whether it did in fact occur—but would it have been possible

(Testimony of Donald H. Campbell.)

for a ticket agent, not in your office, but elsewhere on the line, to have sold a ticket for occupancy of Section 12 on that train leaving Seattle that day?

Mr. McCaffery, Jr.: Just a minute. To which we will object on the ground and for the reason the question calls for conjecture on the part of the witness. There is no reason to say that this witness can testify whether or not an agent or ticket salesman in any of their offices might have made a mistake.

Mr. Pauly: That is what I am trying to get at, your Honor. I want to find out if a mistake could occur.

Mr. McCaffery, Jr.: I will withdraw the objection.

Court: Very well, answer the question.

A. I would say it is impossible because the agent or ticket seller would have to call or wire us to secure space before he could sell it.

Q. Of course, the ticket agent might have failed to do what he should have done? [164]

A. That is true.

Q. That would be the only way that it could have occurred, any duplication of sale?

A. That's right.

Q. But recognizing that is at least a possibility?

A. That is a possibility, yes.

Q. Let me ask you this then: If such a duplication of sale by some ticket agent in contravention to your practice and rules had in fact been made,

(Testimony of Donald H. Campbell.)

does your company practice require that a report of such duplication in sale be made to your office?

A. Very definitely.

Q. Did your office at any time ever receive from any source whatsoever a report of duplicate sale having been made of Section 12 on Train 16 for occupancy, leaving Seattle August 26, 1947?

A. No, sir.

Q. Do you also in your office, Mr. Campbell, quote rates on various space? A. Yes, we do.

Q. Are you generally familiar with rates charged for various space on Train 16?

A. Yes, I am.

Q. In general, will you tell us what, if any, different types or classes of transportation are available on Train 16?

A. Train 16 carries three classes of transportation. [165]

Q. Three classes of transportation. What are they?

A. Coach, which is the most economical and involves only a reserved coach seat. The next class is what we call Touralux. It is an intermediate class. It entitles one on an intermediate ticket to purchase a berth, either upper or lower; and we have the first class, which is Pullman, standard. That is the highest, most expensive rate, and also on the ticket, it entitles one to purchase a room, a roomette or bedroom.

Q. For transportation in coaches, how many tickets are required?

(Testimony of Donald H. Campbell.)

A. One ticket and one coupon for the coach seat reserved, but that is not a ticket.

Q. Is any charge made for the seat?

A. No.

Q. Just for the transportation? A. Yes.

Q. How many tickets are required for transportation in the tourist section?

A. Two tickets.

Q. Will you explain what they are?

A. The rail ticket which is sold at the intermediate rate, plus the charge and ticket sold for the berth.

Q. I take it, the rail transportation charge for tourist passengers is more expensive than for day coaches? A. Yes, it is. [166]

Q. Of course, there is no charge for day coaches corresponding to the sleeper space?

A. That's right.

Q. In the Pullman space, how many tickets are required? A. Two again.

Q. What are they for?

A. That is for the rail and for the Pullman space occupied. In the case of the Olympian Hiawatha, No. 16, it would be a roomette or bedroom.

Q. How does that compare with the corresponding rates for tourist passage?

A. Higher. It is the most expensive form.

Mr. Pauly: That is all.

(Testimony of Donald H. Campbell.)

Cross-Examination

By Mr. Myers:

Q. How long have you worked for the Milwaukee Railroad? A. Approximately five years.

Q. Have you been employed in the Reservation Bureau all during that time?

A. No, I originally was Reservation Clerk in Minneapolis. I was transferred to Seattle where I was Reservation Clerk for two months. From then on, I was ticket seller in the Seattle City Ticket office until June 1, 1947, when the Reservation Bureau was formed. Since then I have been Chief Clerk of the [167] Reservation Bureau.

Q. What are the duties of Reservation Clerk?

A. A Reservation Clerk answers phones, gives out information as to schedules, rates, makes itineraries and assigns space on the diagrams.

Q. The Reservation Bureau to which you have referred was organized in June, 1947?

A. That's right.

Q. Was one of the purposes of that Bureau to eliminate the duplications of sales?

A. Not necessarily. We had reservations taken care of in the Seattle City Ticket Office but with the addition of the new streamline train and the extra business involved, it was deemed necessary to move it out of the ticket office and into a room by itself where it could function more efficiently.

Q. When did the streamliner start to run from Seattle? A. June 29, 1947.

(Testimony of Donald H. Campbell.)

Q. It was at that time the Reservation Bureau was first set up? A. It was set up June 1st.

Q. You have stated that there might be a duplicate sale of tickets if a ticket seller failed to call or wire to secure the space? A. Yes.

Q. That is correct. Wouldn't it be possible, also, Mr. Campbell, [168] for a ticket by mistake to be written out for a particular section although the actual section reserved were some other number?

A. That could be an error, yes.

Q. In other words, the ticket seller is a human being just like the rest of us and they could make a mistake in writing out numbers on a particular ticket? A. That is true.

Q. You have stated that it is a rule of the railroad that where there is a duplicate sale of tickets there should be a report, is that correct?

A. There always is.

Q. So there have been instances of duplicate sales of tickets? A. Yes.

Q. I mean in spite of the system that is set up in the attempt to cut them, do duplicate sales of tickets for sections occur? A. That's right.

Q. And it would also be possible, would it not, Mr. Campbell, for an error to be made in seating passengers holding a particular ticket, so that by mistake they were placed in some other section than that for which their ticket called?

A. Well, the porter, when he puts them on the

(Testimony of Donald H. Campbell.)

train, will check their space and seat them in that section or berth.

Q. He would look at their ticket, is that correct?

A. Either that, or he will ask as to the space they are holding and escort them to the space.

Q. It would be possible for a mistake to be made in securing that information so that an individual could be seated at first in a space other than that for which he had bought a ticket, isn't that just another human error that could possibly occur?

A. Yes, that is possible.

Mr. Myers: That is all.

Mr. Pauly: That is all.

(Witness excused.)

THOMAS FRANCIS NOLAN

called as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. Mr. Nolan, you testified here previously, did you not? A. Yes, sir.

Q. You were sworn at that time?

A. That's right.

Q. You stated you were the sleeping car conductor on Train 16 leaving Seattle August 26, 1947?

A. That's right.

Q. Reference has been made here and you have heard reference made to an accident sustained on

(Testimony of Thomas Francis Nolan.)

that train by Mrs. Harrington. [170] Did you, at any time, learn of that accident prior to your attendance in Court? A. Yes, sir.

Q. How did you first learn that Mrs. Harrington had been in an accident?

A. I heard it directly from Mrs. Harrington at the time I was picking up her ticket.

Q. On that train? A. On that train, sir.

Q. What time did that train leave Seattle, do you know? A. 2:45 p.m.

Q. What did you do, if anything, immediately after the departure of that train from Seattle?

A. I started to collect my tickets.

Q. Where did you start?

A. In Car B, B-16.

Q. Will you tell us where B-16 was located in the train on that day?

A. Car B-16 is directly behind Car A-16, that is, looking forward on the train.

Q. How many Touralux cars did you have in the train on that day? A. I had three.

Q. B and A and what other? A. F, F-16.

Q. Will you describe to us—you have indicated B was immediately behind A?

A. That's right.

Q. Where was Car F located?

A. F, immediately before A.

Q. So that from the rear going forward, the cars would be located in the order B, A and F?

A. That's right, sir.

(Testimony of Thomas Francis Nolan.)

Q. You started picking tickets in Car B?

A. Yes, sir.

Q. In what end of Car B?

A. The rear end of the car B.

Q. Is that your usual practice?

A. Yes, sir.

Q. Is there a reason for that?

A. Yes, there is a reason as far as I am personally concerned. I have always started picking tickets up there and then working forward on the train, working each car in succession. Then, generally, by the time I complete the lifting of the tickets of the three Touralux cars, as a rule, I will meet the train conductor, to whom I turn over the railroad tickets.

Q. Do you collect tickets in day coaches?

A. No, sir.

Q. Who does? A. The train conductor.

Q. He does that while you are collecting tickets in the Touralux? A. Yes, sir.

Q. You work toward each other?

A. That's right.

Q. You meet generally at the end of the day coaches or forward end of the Touralux coaches?

A. As a rule.

Q. On this particular occasion, do you remember whether or not you did begin the collection of tickets in the Touralux cars at the rear end of Car B?

A. Yes, sir.

Q. And worked forward?

A. That's right, sir.

(Testimony of Thomas Francis Nolan.)

Q. Had you completed the collection of tickets when you first learned of Mrs. Harrington's accident? A. No, sir.

Q. How far had you gotten in the process of collecting tickets?

A. I had completed Car B and that part of Car A up to Mrs. Harrington's section.

Q. Will you describe to us what the arrangement of the Touralux car with respect to the placement of berths is and the general practice with respect to the placement of low numbered sections in any particular portion of a car with respect to the motion of the train, the low numbered berths? [173]

A. The low numbered berths are to the rear of each car. Does that answer your question?

Q. Yes. Is that customary?

A. That is always the rule so far as those cars are concerned, at least.

Q. Are Touralux cars so designed that the low numbered berths are adjacent to the ladies' rest room?

A. No, the low numbered berths are adjacent to the men's lounge.

Q. The men's lounge? A. Yes, sir.

Q. The high numbered berths are forward?

A. Yes, sir.

Q. And the men's room is ahead of them?

A. No, the ladies' room.

Q. With respect to the motion of the train, can you tell us how the even numbered and the odd numbered berths are divided in the car?

(Testimony of Thomas Francis Nolan.)

A. In respect to the direction of the train, did you say?

Q. Yes.

Q. Looking forward in the car, the odd numbers are to the right and even numbered berths are to the left, that is, of the middle aisle.

Q. Is there any particular reason for operating the car in that position with the high numbers to the front end of the car?

A. I don't know of any, sir. I don't think I know of any [174] reason for it.

Q. But is that uniform practice?

A. Yes, sir, on that train. I am referring to these cars, of course.

Q. So that in Car A, as you were picking up the tickets, did you start at the high or low berths?

A. Low berths.

Q. And worked on up? A. Yes, sir.

Q. You had reached Section 12?

A. That's right.

Q. You say you then learned of Mrs. Harrington's accident from her? A. That's right.

Q. How did she inform you of the accident?

A. I asked her for her ticket. She told me, "I have been hurt, I fell."

Q. What did you do, if anything?

A. At that time I just dispatched the porter for her daughter. I think Mrs. Harrington herself, or somebody told me her daughter was on the train with her. I sent the porter for Miss Harrington.

(Testimony of Thomas Francis Nolan.)

Q. The porter was in the car at that time?

A. Yes, sir.

Q. What did you yourself do? [175]

A. I then went and summoned the train conductor.

Q. Do you recall where you may have found him?

A. He was forward in the train. I can't tell you exactly what spot, but it was forwarded in the train.

Q. What did you do then?

A. We asked—I asked Mrs. Harrington if she desired a doctor.

Q. Did you return to Mrs. Harrington?

A. Yes. I should say I came back with the train conductor and I inquired as to whether a doctor was desired and was told that that wouldn't, that it wasn't necessary, it was thought to be unnecessary.

Q. Was the daughter there at the time you returned? A. Yes, sir.

Q. Was the porter in the car when you returned?

A. Yes, sir.

Q. Did you make any offer of assistance of any kind?

A. Yes, sir. The very fact that I offered to wire for a doctor, that in itself, and I did eventually ask if the berth wanted to be made up.

Q. Was that at the suggestion of either Mrs. Harrington or her daughter?

A. No, I wouldn't say it was. I am inclined to

(Testimony of Thomas Francis Nolan.)

believe that I asked if they wanted it made down for her comfort.

Q. Did you wire for a doctor immediately?

A. No, sir. [176]

Q. Did you immediately order the berth made down? A. No, sir.

Q. Did you inquire of Mrs. Harrington or her daughter, either one, whether they wanted you to take such action?

A. I believe it was Miss Harrington I talked with for the most part. I inquired of her, as I recall.

Q. What did she say?

A. She said, as I recall, no not at that time, she didn't think so.

Q. Did Mrs. Harrington make any explanation of how or why she had fallen?

A. No, sir, not to me she didn't.

Q. Did you, at any time, make any inquiry to determine whether anyone else in the car may have known how or why Mrs. Harrington may have fallen?

A. Immediately I did not, but I did later. Immediately I didn't, I was concerned with other things.

Q. When was it you inquired of the other witnesses?

A. I would roughly judge, perhaps, after I satisfied myself that they didn't want a doctor and didn't want the berth made down, and I am inclined to

(Testimony of Thomas Francis Nolan.)

believe I completed picking up my tickets and it was after that some time that I inquired about witnesses.

Q. What did you learn with respect to whether or not there were any other witnesses? [177]

A. I received the names of several witnesses.

Q. Do you recall them now?

A. Yes, sir, I can recall their names, I believe I can.

Q. What are they?

A. There was a Mr. and Mrs. Stratton. There was a lady with two children—that name slipped me for the moment.

Q. Can you tell us how many people there were?

A. Yes. I took down the names of five people. That is not counting the names of those two children, however. Mr. and Mrs. Stratton, Mr. and Mrs. Abney—I think the name is Abney.

Q. From Alabama?

A. From some place down South.

Q. Do you know the name of the fifth person?

A. It was this mother of the two children. Sorry, I can't recall it right now.

Q. But, according to your recollection, there were five adults? A. Yes, sir.

Q. And two children?

A. Two children, but I didn't take the names of the children.

Q. Two children with one of the ladies?

A. Yes, sir.

Q. You took the names of the witnesses and their addresses? A. Yes, sir.

(Testimony of Thomas Francis Nolan.)

Q. That is all the witnesses you were able to identify? [178]

A. That is all I was able to secure.

Q. Mr. Nolan, would you be able to give us any idea how long it was from the time you left Seattle until you reached Section 12, Car A and first learned of Mrs. Harrington's accident?

A. I would say approximately, I would say from half an hour to 45 minutes.

Q. Do you know where you were on the railroad? That is, would you be able to identify any station on the railroad where you were at the time you arrived at Section 12 and learned of the accident?

A. No, sir, I would not. I don't recall any specific location.

Q. Was Mrs. Harrington in Section 12 when you first saw her? A. Yes, sir.

Q. Did she hold a ticket for that space?

Mr. McCaffery, Jr.: Object to this question. It has been admitted in the answer.

Court: Go ahead, answer the question. Overruled.

A. You mean did she hold a ticket personally herself?

Q. Yes.

A. I believe her daughter held the tickets.

Q. She and her daughter did hold tickets for Section 12? A. Yes.

Q. Did anyone else on that train hold tickets calling for Section 12? A. No, sir. [179]

(Testimony of Thomas Francis Nolan.)

Q. So far as you know, was there any duplication or mixup in the occupancy or sale of tickets for Section 12? A. No, sir.

Q. Do you have any recollection, Mr. Nolan, as to whether or not the train had made any stops between Seattle and the time when you reached Section 12 and first learned of Mrs. Harrington's accident?

Mr. McCaffery, Jr.: Just a minute. To which we will object on the grounds and for the reason it isn't the best evidence. That the trains are equipped with a ticker and that would definitely show whether any stops had or had not been made. That is the size of it.

Court: Overruled.

A. There was one stop made.

Q. What? A. There was one stop made.

Q. Where was that? A. Renton.

Q. Is that a scheduled stop? A. Yes, sir.

Q. Approximately how far out of Seattle is it?

A. Approximately 12 miles. I am more or less guessing at that, sir.

Q. Well, we will have more definite information on it. Is that a stop at which the train has an assigned period of time [180] to wait there or not?

A. No, sir.

Q. Did you get off the train at Renton?

A. No, sir, I did not.

Q. Was the entire time between the time the

(Testimony of Thomas Francis Nolan.)

train left Seattle and the time you reached Section 12 taken up by you collecting tickets?

A. Yes, sir.

Q. In the process of collecting those tickets, were you then on your feet during all that time?

A. At all times, sir.

Q. Will you tell us, if you can, whether or not there were any lurches or jerks in the movement of that train between the time it left Seattle and the time you got up to Section 12?

A. I have no recollection, sir, of any unusual movement of the car.

Q. You testified you were on your feet during the whole of that time?

A. Necessarily so, picking up tickets.

Q. Do you recall whether or not there was any jerk in the movement of that train as it started up from the stop at Renton? A. No, sir.

Q. You were on your feet at that time?

A. Yes, sir.

Q. About how long after you first learned of Mrs. Harrington's [181] accident did you order the berth made up?

A. I am not so sure I could say, sir. Roughly speaking, I estimate it might have been within the following couple hours. That is, it was within the following couple of hours, I believe, but I can't be too specific about that.

Q. Was that on your own initiative or at the request of either Miss or Mrs. Harrington?

(Testimony of Thomas Francis Nolan.)

A. As I recall, Miss Harrington, at a later time, asked me to have the berth made up.

Q. How did you arrange to have that done?

A. I notified the porter and he did so.

Q. You stated you later arranged to have a wire sent for a doctor? A. That's right, sir.

Q. Approximately how long was that after you first learned of the accident?

A. I am inclined to believe it was about the same time we had the berth made up.

Q. Was that on your own initiative or the request of Miss Harrington?

A. At the request of Miss Harrington.

Q. What arrangements did you make for a doctor?

A. I notified the train conductor. As is the usual procedure, I made out the wire and gave it to him and he dropped it off.

Q. Where was the wire addressed? [182]

A. To Spokane.

Q. To arrange for a doctor to meet the train at Spokane? A. That's right, sir.

Q. Did you, at any time after this, inquire of either Mrs. Harrington or Miss Harrington whether there was anything more you could do to assist either of them?

A. I don't know whether it was due to my inquiry or whether Miss Harrington came up to me about having changed her mind about wanting a doctor and wanting the berth laid down.

(Testimony of Thomas Francis Nolan.)

Q. Did you at any time offer to assist them in any way?

A. I hope it was understood that we would be at their assistance at any time. That is the general belief I would like to give at a time like that.

Q. Insofar as any request may have been made of you by either Mrs. Harrington or Miss Harrington, did you attempt to comply with it?

A. Yes, sir.

Mr. Pauly: That is all.

Cross-Examination

By Mr. McCaffery, Jr.:

Q. I think it is Thomas Patrick Nolan?

A. No, sir.

Q. Thomas Francis? A. That's right.

Q. Mr. Nolan, isn't it a fact that it is the custom of the conductors, the sleeping car conductor in the Touralux and the conductor in the Pullman cars to start in at the observation car and pick up tickets together and then meet the train conductor in the Touralux cars?

A. Are you assuming I picked up Pullman tickets?

Q. Yes.

A. No, sir, I have no chores in those Pullmans.

Q. I am not asking what chores you have. We have had evidence from you as to what the custom of the railroad has been. I am just asking you a very simple question as to what the custom is between you and the Pullman conductor in picking up

(Testimony of Thomas Francis Nolan.)

tickets. Is it not the custom, Mr. Nolan, for you and the Pullman conductor to start from the observation car and work forward?

A. It isn't the custom.

Q. Do you do it? A. No, sir.

Q. Never do it? A. We never have.

Q. The Pullman conductor wasn't with you at the time you came to Mrs. Harrington?

A. No, sir.

Q. And you asked about her ticket?

A. Yes, sir. [184]

Q. You were absolutely alone?

A. Yes, sir.

Q. You were? You had started in Car B?

A. That's right.

Q. Another thing, Mr. Nolan, if you know: Do the porters leave for lunch immediately after the train leaves Seattle? A. No, sir.

Q. When do they have their lunch?

A. They have it sometime later, considerably later.

Q. How much later?

A. Well, it would generally be after 3:30.

Q. After 3:30? A. Yes, sir.

Q. That would be a period of 45 minutes out of Seattle?

A. Probably longer than 45 minutes.

Q. You said 3:30. A. I said after 3:30.

Q. You left at 2:45? A. That's right.

Q. You remember that distinctly?

(Testimony of Thomas Francis Nolan.)

A. I won't say that, that is, distinctly, but that is the time we generally leave.

Q. That is the time you are scheduled to leave?

A. That's right, sir.

Q. On your train schedule out of Seattle, you have listed [185] Black River and Renton in the same type. Is Black River a scheduled stop or not?

A. Before answering that, sir, may I say my work does not concern having one of those schedules that give all those stops. I can answer the question if you care to have me do so. Black River is not a stop.

Q. Renton is a scheduled stop?

A. Yes, sir.

Q. I think you stated you got the names of five people as witnesses in the car?

A. That's right, sir.

Q. You picked up their tickets?

A. Of the witnesses, sir.

Q. Of those same witnesses? A. Yes, sir.

Q. How many were travelling on passes?

A. None.

Q. Not a one? A. No, sir.

Q. How many passes did you have on car 12 that day? A. On which car, sir?

Q. Car 16?

A. I don't think I had any passes; in fact, I know I didn't.

Q. You know you didn't. Did the Pullman conductor ever come to the place where Mrs. Harrington was seated in Section 12 of [186] Car A?

(Testimony of Thomas Francis Nolan.)

A. To my knowledge, he didn't.

Q. He didn't. Then it was the train conductor who you brought back with you to the car?

A. Yes, sir.

Q. Was the Passenger Agent brought also; was he on the train?

A. Just what do you mean by Passenger Agent?

Q. I don't know that is the term used on the railroad, you got me.

A. I will answer no.

Q. Was any other person who had any official capacity with the railroad brought back? Did you bring anybody else? A. I did not.

Q. Did any official of the railroad company other than the train conductor and yourself come back? A. It is quite likely.

Q. And it being quite likely, Mr. Nolan, who would it be?

A. I think perhaps you are referring to what we call the Passenger Representative.

Q. Do you know the name of the Passenger Representative, Mr. Nolan?

A. I have a recollection his name was Mr. Wellenback, it is a name similar to that.

Q. Have you seen him present in the court room? A. No, sir. [187]

Q. You haven't seen him here?

A. No, sir.

Q. I don't suppose, Mr. Nolan, you want this jury to understand by your answer that there was

(Testimony of Thomas Francis Nolan.)

no mix-up in the section that Mrs. Harrington occupied that so far as you know, you don't know there was any mix-up before you talked to Mrs. Harrington?

A. A mix-up of what sort, sir?

Q. In her occupancy of Section 12.

A. No, I don't know there was.

Q. You don't know. In other words, at the time you picked up her tickets, she was seated in her proper section? A. That's right, sir.

Q. But you are not willing to testify as to anything that occurred before that time, are you, Mr. Nolan?

A. No, because I wasn't in the car.

Q. You didn't know. Isn't it a fact, Mr. Nolan, that as you progressed through your car, you are very careful to travel the rugged portion of the aisle and stand on the rugs picking up tickets?

A. I am travelling on the aisle.

Q. You are travelling on the aisle?

A. That's right.

Q. And that is covered with rug, is it not, Mr. Nolan? A. That's right, sir. [188]

Q. Had you or had you not, Mr. Nolan, reached the town of Ellensburg at the time you wired for a doctor, or had you passed it, if you can recall?

A. I can't recall, sir.

Q. Do you make a scheduled stop at Ellensburg, or do you not? A. Do we, or did we?

Q. All right, did you? A. We do.

(Testimony of Thomas Francis Nolan.)

Q. Did you then?

A. We do now, but we didn't then. We didn't do it at that time.

Q. Ellensburg is quite a large town, isn't it?

A. I don't know. I have never been in town, just gone through.

Q. You have a considerable stop, Mr. Nolan, at Othello? A. Yes, sir.

Q. Would you be able to state whether or not you had wired ahead to Spokane before you had arrived at Othello?

A. I am not able to say, sir.

Q. Can you tell me in which manner the wire was dispatched?

A. Yes, I made out the, I wrote out the message and gave it to the train conductor, and he in turn dropped it off, as we say, or handed it in.

Q. That doesn't require a physical stop of the train to send a wire then?

A. I am afraid I can't answer that because I am not too well [189] acquainted with the different methods there are of passing off and handing off telegrams.

Q. I believe that the schedule would bring the train upon which you were travelling into Othello at 7:20 in the evening? A. That's right, sir.

Q. There is a 15 minute scheduled stop at Othello? A. That is correct.

Q. That is about two hours and 40 minutes out of Spokane? There is a scheduled stop at Spokane at 9:55? A. Yes, sir.

(Testimony of Thomas Francis Nolan.)

Q. You have no independent recollection at this time, Mr. Nolan, as to whether that wire had been dispatched before you left Othello or not?

A. No, sir, I do not.

Q. You said, I believe, you prepared the wire?

A. Yes, sir.

Q. You wired for the doctor at Spokane?

A. I wired to Spokane for a doctor.

Q. You wired to Spokane for a doctor?

A. Yes, sir.

Q. Was there any reason that you can ascribe at this time, Mr. Nolan, why the wire was not directed to Othello?

A. I don't know. I am not so sure whether there was a doctor at Othello. That might have had some bearing on it, but I am not sure. [190]

Q. Did you get a railroad ticket from Mrs. Harrington?

A. Personally from her, do you mean?

Q. Yes. A. No, sir.

Q. What did she tell you?

A. I am not so sure. I am inclined to believe I heard some place, from her or from another source, that the tickets were in the daughter's possession, but I won't say Mrs. Harrington told me that. That was the impression I received some place.

Q. Who turned over the ticket for Mrs. Harrington's transportation to you?

A. That I don't recall.

(Testimony of Thomas Francis Nolan.)

Q. When did you pick up your sleeping car accommodations for Section 12 and from whom?

A. I don't know. I either got them directly from Miss Harrington, or perhaps, they might have been given to me by the train conductor. Sometimes that is done; or by some other party on the train.

Q. Mr. Nolan, do you have any idea how you remembered the sequence of those cars as B, A, F, on that night? A. On that night?

Q. On that train?

A. That day? That is the way they had been on every train I had worked up to that time.

Q. That is the custom, then, B, A. F? [191]

A. That is from the rear.

Q. I understand. A. It is just B, A, F.

Q. B, A, F, it is always B, A, F?

A. Yes, on the Touralux.

Q. Then, behind that train on that particular day, how many Pullman sections did you have?

A. By "behind the train," you mean on the train?

Q. Including the club car. I think the club car is usually situated behind B on the train?

A. No, sir.

Q. Would it be ahead of F? A. Yes, sir.

Q. Then behind B did you have your diner?

A. Yes, sir.

Q. Then behind the diner, you would have a Pullman and an observation?

(Testimony of Thomas Francis Nolan.)

A. That's right, sir.

Q. On that day, were you pulling the new type equipment or old type on the pullman sections, do you remember?

A. We were pulling old type as far as Pullman sections were concerned, sir.

Q. Did you state on direct examination, Mr. Nolan that you called the porter to make up the birth?

A. I said I notified the porter. To the best of my recollection [192] I did.

Q. But somebody else might have?

A. That is entirely possible.

Mr. McCaffery, Jr.: That is all, Mr. Nolan.

Redirect Examination

By Mr. Pauly:

Q. Let me ask you: Did anyone, previous to the time when you arrived at Section 12, approach you regarding any sort of mix-up or duplication of space in Section 12 in Car A?

A. To my knowledge, no one did.

Q. In answering that question, do you intend to refer both to the time you were at Seattle and after you left Seattle? A. That's right, sir.

Q. Did the porter, at any time, either before leaving Seattle or afterward, ever come to you regarding a mix-up or duplication in the occupancy of Section 12, Car A? A. No, sir.

Q. You were asked whether the Pullman conductor came up to Section 12 in Car A. Does the

(Testimony of Thomas Francis Nolan.)

Pullman conductor have anything to do with that part of the train?

A. No, sir, nothing whatever.

Q. You have nothing yourself to do with the Pullman section? A. Absolutely not.

Q. He has nothing to do with the Touralux section? [193] A. That's right.

Q. Who is this other train official you referred to?

A. He is what we call a Passenger Representative.

Q. Is he a part of the train crew?

A. At that time he wasn't what you would call a regular train employee in the true sense of the word. He was riding on the train. He was rather what you would call a company employee riding on the train.

Q. There may have been other company employees?

A. Yes, there could have been others, but this man we knew was there.

Q. You were asked whether you walked on carpets all the time. I will ask you, Mr. Nolan, if there are any carpets on the part of the Touralux cars that go past the rest rooms at either end of the car?

A. I understood the question to be did I walk on carpets while I picked up tickets, and I answered yes. That is true while I am actually picking up tickets.

(Testimony of Thomas Francis Nolan.)

Q. While you are in the ends of the cars along side of the rest rooms, there is no carpeting there?

A. There is no carpeting there and I pick up no tickets.

Q. The floor there is the same as between the seats on either side of the aisle? A. Yes, sir.

Q. In the men's room there is no carpeting in part of that? [194]

A. On part of that there is no carpeting.

Q. Do you know whether or not you might have been in there picking up tickets any time?

A. I do occasionally. If there is passengers sitting in there, I will go in and pick up tickets.

Q. Going from one end of a car to the next car, there is no carpets in there, of course?

A. No.

Recross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Nolan, for the benefit of the jury, would you describe the vestibule in the front end of the car and the vestibule in the rear end of Car A with reference to the corridor through which you pass once you leave the rugged surface passing from the aisle of the car? A. Would I describe it?

Q. Yes.

A. It is about, roughly speaking—here again I am approximating this measurement—I would say about two and a half feet wide. It runs along the windows, the windows are one side, that is the side you are on, and the side of the ladies' lounge or

(Testimony of Thomas Francis Nolan.)

men's lounge, as the case may be, is on the other side, and the floor has this composition we spoke of, no carpeting, and there is a rail along there, a safety rail. [195]

Q. There is a rail along the window side, is there not, Mr. Nolan? A. Yes, sir.

Q. Along the left side there is a complete wall?

A. These aisles we refer to are on opposite sides of the car.

Q. I see what you mean.

A. On the men's end, of course the Aisle would be on the left hand side of the men's lounge, and, of course, in the other end, it would be to the right of the ladies' lounge.

Q. Would I be incorrect in stating, Mr. Nolan, that there is complete protection to anybody traversing that area from a full wall on one side and a hand rail on the other?

A. I would say it is protection, yes, sir.

Mr. McCaffery, Jr.: That is all.

Court: Mr. Nolan, this Passenger Representative?

A. Yes.

Court: He was on the train. Was he working on the train?

A. In a sense he was working. He was accompanying us at that time, the train being new, and I believe they were. They probably had a multitude of duties.

Court: But the Train Representative actually was engaged in his business on that train?

(Testimony of Thomas Francis Nolan.)

A. What I want to make clear was: we don't have them all the time. We don't have them at this time, for instance. It was a temporary measure.

Court: There is one other question I want to ask you, Mr. Nolan. Do you recall the train stopping at Renton?

A. I don't recall definitely it stopped there. There is a scheduled stop there.

Court: But you don't recall it?

A. Not in particular. I know there is a stop there.

Court: Very well, that is all. I think we will take a short recess, Mr. Pauly, at this time.

(Witness excused).

(Ten-minute recess.)

JESSE LOVE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. What is your name?

A. Jesse Love.

Q. Where do you live? A. Chicago.

Q. Are you employed by the Milwaukee Railroad? A. Yes, sir.

Q. In what capacity?

A. Sleeping Car Department.

Q. What specifically is your job? [197]

(Testimony of Jesse Love.)

A. Sleeping car porter.

Q. How long have you been employed by the Milwaukee Railroad as a sleeping car porter?

A. 27 years.

Q. Were you so employed in August, 1947?

A. Yes, sir.

Q. Were you so employed on train No. 16 leaving Seattle on August 26, 1947? A. Yes, sir.

Q. What car were you assigned to?

A. Car A-16.

Q. What in general is that referred to as, what kind of a car is that? A. Touralux car.

Q. Is that a sleeping car? A. Yes, sir.

Q. How long had you been on that assignment before August 26th, on that particular train, 1947?

A. That train was put on, I think, June 29th, and I was on since the new train had been put on.

Q. You went on that train as sleeping car porter when that train started, is that right?

A. Yes, sir.

Q. Do you recall that as being the train trip on which Mrs. Harrington claims to have suffered an accident? [198] A. Yes, sir.

Q. Do you recall you assisted Mrs. Harrington and her daughter to board the train at Seattle?

A. I don't remember.

Q. Do you remember whether or not you carried any luggage for them on to the train?

A. I don't remember that.

Q. On the train do you know whether or not you assisted them in occupying Section 12?

(Testimony of Jesse Love.)

A. Yes, sir.

Q. Was that when they first boarded the train or not?

A. When they first boarded the train.

Q. You showed them to their section?

A. Yes, sir.

Q. Did you inquire of them what section they occupied? A. Yes, sir.

Q. What did they tell you they occupied?

A. Section 12.

Q. Is that the section to which you took them?

A. Yes, sir.

Q. Was there anybody in that section at that time? A. No, sir.

Q. Do you recall whether you put any luggage belonging to Mrs. Harrington or Miss Harrington into Section 12 at that time?

A. Yes, sir. [199]

Q. What luggage did you put in the Section?

A. I didn't understand you.

Q. What luggage did you put in the section?

A. Some bags.

Q. Where? A. Section 12.

Q. What part of Section 12?

A. I put them in the seat, front seat, underneath the seat.

Q. How many pieces were there, if you know?

A. I think there was about three pieces, two or three pieces.

Q. Some you put on the seat, some under the seat, is that right? A. That's right.

(Testimony of Jesse Love.)

Q. As far as you know, Mr. Love, did anyone else on that train hold any ticket for Section 12 leaving Seattle that day, other than Mrs. Harrington and her daughter? A. No, sir.

Q. Did you, before the train left Seattle, go make any inquiry of the sleeping car conductor regarding who was entitled to occupy Section 12 in Car A-16?

A. No, sir.

Q. Did you make any such inquiry of any other person? A. No, sir.

Q. Did you make any such inquiry of any person after leaving Seattle? [200] A. No, sir.

Q. How did you first learn, Mr. Love, that Mrs. Harrington had been in an accident?

A. A passenger told me. I was in the rear of the car and a passenger told me there was a lady fell out of the seat.

Q. Do you know who the passenger was?

A. No.

Q. A man or lady? A. A man.

Q. Where were you at that time?

A. In the rear of the car.

Q. What, if anything, were you doing?

A. Straightening out some linen in the locker.

Q. In what locker?

A. In the locker, my linen locker.

Q. In what part of the car is the locker located?

A. In the rear end of it around Section 1 and 2. That is the car's rear end.

(Testimony of Jesse Love.)

Q. The low numbered sections are located to the rear of the car? A. Yes, sir.

Q. Where is the ladies' rest room located?

A. In the front end of the car.

Q. And the high numbers are located to the front end? A. Yes, sir. [201]

Q. The men's room, then, is located to the rear end? A. That's right.

Q. Where is your locker with respect to the men's room?

A. Next to the men's room; around close to the men's room in the rear end.

Q. Are the Touralux cars always transported in that position with the high numbers forward and the low numbers to the rear? A. Yes, sir.

Q. Is there any particular reason, Mr. Love, why that is so?

A. That is the way it is made, the way the berths got to be laid down.

Q. Will you explain that a little further to us?

A. It is the way it is made. The berth opens up from the front. Otherwise, the passenger would be riding backwards.

Q. When a berth is made up, the person lying in the berth should have their head to the front end of the train, is that right? A. Yes, sir.

Q. I take it from what you say these Touralux berths are so designed that the head end of the berth must always point toward the end of the car which has the high numbers? A. That's right.

(Testimony of Jesse Love.)

Q. If it were otherwise, the passengers would be sleeping backwards with their heads pointing toward the rear of the train? [202]

A. Yes, sir.

Q. What is there about the berth that results in that? What is there about it that makes it necessary for the head to point in that particular direction?

A. That is the regular way of riding. Those particular cars are made one way, that is from the head one way. Those Touralux cars are made that way, so it couldn't be used otherwise. If you did, it would be going backwards.

Q. Couldn't you reverse the passenger by simply switching the pillow? A. It isn't handy.

Q. Are there any shelves involved in making up a berth in a Touralux car?

A. At the foot of the bed there is a little shelf. You raise the back up and there is a little shelf.

Q. Is there any such shelf at the head?

A. No.

Q. So, if the car wasn't in that position, the shelf would be at the head? A. That's right.

Q. Is the mattress designed so as to require the bed to be made up in that position?

A. Yes, it is. In a way of speaking, it is slit half in two. It is split half open. There is a separation in there.

Q. Is the separation in the middle? [203]

A. More at one end than directly in the middle.

(Testimony of Jesse Love.)

Q. At the time that you first learned of Mrs. Harrington's accident you were standing near your locker in the rear end of the car. What did you do then? A. I went to see what could be done.

Q. Who, if anyone, was there when you got there?

A. The conductor was there when I got there.

Q. What conductor are you referring to?

A. The sleeping car conductor.

Q. Mr. Nolan? A. Yes, sir.

Q. Where was Mrs. Harrington?

A. She was in her seat.

Q. In what section? A. 12.

Q. As far as you know, did she at any time occupy any other seat in the train except in Section 12? A. No, sir.

Q. On arrival there at Section 12 when Mr. Nolan was there, did he instruct you to do anything?

A. Yes, sir.

Q. What did he instruct you to do?

A. Go and get her daughter, the lady's daughter.

Q. Did you yourself know where the daughter was?

A. I didn't know. I heard someone say where she was. [204]

Q. Where did you go looking for her?

A. In the club car.

Q. You had been given reason to think she was there? A. That is what they told me.

Q. Who told you?

(Testimony of Jesse Love.)

A. The passengers standing around there. They told me she was in the club car.

Q. By the club car—where is the club car located in that train, if you know, with reference to car A?

A. The club car is located the second car. The next car is car F and the next car is the club car. There is car F and the club car.

Q. Going forward in the train?

A. Yes, sir, going forward.

Q. The club car is different than the observation car? A. Yes, sure.

Q. Did you find Miss Harrington in the club car? A. Yes, sir.

Q. Did you tell her? A. Yes, sir.

Q. What did you tell her?

A. I told her her mother had an accident, fell out of the seat.

Q. Did she return to car A?

A. Come right back, yes, sir. [205]

Q. What did you do?

A. I come back with her.

Q. When you got back there, was Mr. Nolan at Section 12?

A. Yes, they were all there, quite a few of them standing there.

Q. Who else was there?

A. Some of the passengers and Mr. Nolan.

Q. And Mr. Nolan? A. And Mr. Nolan

Q. Do you know if the train conductor was there or not?

(Testimony of Jesse Love.)

A. Was the train conductor there?

Q. Yes. A. Not at that particular time.

Q. Did the train conductor later arrive?

A. Yes, sir.

Q. There were other people there present too?

A. Yes, sir.

Q. What did you do then?

A. There was nothing for me to do then. I couldn't do anything at the present time.

Q. Were there other people between you and the section in the aisle? A. Yes, sir.

Q. Did you go through those people to the Section? A. I did. [206]

Q. Did you pass through those people standing in the aisle to go to the section?

A. Yes, sir, I got through them.

Q. Did you take part in any conversation there?

A. Not then, just merely standing there and listening.

Q. The train conductor and Mr. Nolan were there while you were there?

A. The train conductor came there shortly after.

Q. Were they in conversation with Miss Harrington and Mrs. Harrington? A. Yes, sir.

Q. You yourself took no part in it?

A. Yes, sir.

Q. Did Mrs. Harrington make any statement as to what happened?

A. No, not at that partciular time.

Q. Did you hear any statement from anyone

(Testimony of Jesse Love.)

else—withdraw that question. Do you know, Mr. Love, approximately how long it may have been after leaving Seattle when you first learned of Mrs. Harrington's accident?

A. Well, I don't believe I could exactly say. It must have been about 35 or 40 minutes, maybe a little longer than that. It was after we left Renton.

Q. It was after you left Renton?

A. After we left Renton.

Q. How far from Renton, or do you know? [207]

A. I couldn't say.

Q. You, of course, didn't see Mrs. Harrington?

A. How is that?

Q. You did not see Mrs. Harrington's accident? You yourself didn't see the accident?

A. No, sir.

Q. Could you have seen it from where you stood by your locker?

A. No, I couldn't have seen it.

Q. Let me ask you if during any part of the time after the train left Seattle and the time you heard of this accident you left car A?

A. No, sir.

Q. Did you get off the train at Renton, do you know? A. Yes, sir, I got off there.

Q. Did you leave the car at Renton?

A. I was standing right by. You have to get off there for a second or two, just make a little stop.

Q. Except for that instance, did you leave Car A at any other time? A. No, sir.

(Testimony of Jesse Love.)

Q. Between Seattle and the time you learned of Mrs. Harrington's accident? A. No, sir.

Q. Do you recall whether or not you made up Section 12 so that Mrs. Harrington could lie down?

A. Yes, sir.

Q. Do you know how long that was after you first learned of the accident, approximately?

A. About an hour or an hour and a half, something like that.

Q. Who asked you to do that, Mr. Love?

A. Mr. Nolan, the sleeping car conductor.

Q. The sleeping car conductor, Mr. Nolan?

A. Yes.

Q. Did Miss Harrington ask you to do so?

A. No, she didn't ask.

Q. Mr. Love, I ask you whether or not the sections in Touralux cars are equipped with a bell used for the purpose of summoning the porter?

Mr. McCaffery, Jr.: Just a minute, to which we object on the grounds and for the reason that the affirmative defense as asserted by the defendant in its pleading does not state facts sufficient to constitute a defense to this action on the following grounds and for the following reasons: that the defense sought to be asserted would only constitute some negligence on the part of the plaintiff, if proven, and such negligence would be remote and would not in any way contribute to her injuries; second, that the defense, if asserted, would not tend to show negligence of a passenger who attempted

(Testimony of Jesse Love.)

or stood up while the train was stopped in an attempt to hang up her hat; that there is no requirement that a person ring for the porter, and even though the testimony were to show that the car was so equipped, the asserted defense would fail because such negligence, if any, would not be a contributing, concurring, or proximate cause of the plaintiff's injuries.

Court: Did you cite authority on that in your trial memorandum, Mr. McCaffery?

Mr. McCaffery, Jr.: I did not, your Honor.

Court: Do you have any?

Mr. McCaffery, Jr.: I don't have any at this time.

Court: Do you want the Court to consider the problem further before ruling on it?

Mr. McCaffery, Jr.: May I have a few minutes to consult with co-counsel in this connection?

Court: I think before you go further that the Court is going to take some time and consider the matter.

Mr. McCaffery, Jr.: I want to add another grounds to our motion, if the Court please. On the further grounds and for the further reason that the evidence at this point discloses that the porter had been in assistance upon the defendant and had previously failed in his duties to the plaintiff in assisting her by hanging up her hat or otherwise rendering such assistance as porters are customarily required to render. Further, that the affirmative

(Testimony of Jesse Love.)

defense fails to assert that it was her negligence which proximately caused her injuries and merely asserts she was negligent and careless in failing to wait [210] for the services of the porter.

Court: Ladies and gentlemen of the jury, you are admonished by the Court not to discuss with each other or anyone else, nor suffer yourselves to be addressed by anyone concerning the subject of this trial, nor are you to form or express any opinion thereon until the case is finally submitted to you. You will be excused until ten o'clock tomorrow morning. You may leave the stand, Mr. Love.

(Thereafter, in the absence of the jury, argument was had in the absence of the jury, after which an adjournment was taken until 10 o'clock a.m., the following morning, October 21, 1949, at which time the following proceedings were had, the jury and counsel for both parties being present:)

Court: Where is the witness? The witness Love, I believe was on the stand. The matter before the Court now is the objection of plaintiff to the introduction of evidence, is that right?

Mr. Garlington: I believe that is right, your Honor. Perhaps before you make a ruling on that objection you might pass upon our application to amend the affirmative defense in the answer. We ask leave to amend the affirmative defense in accordance with the written amendment heretofore

furnished to the Court and counsel by inserting the same at the beginning of paragraph 2 of the affirmative defense set up in the defendant's answer. The application to amend is made and based upon the change in the issues presented by the amendment to the plaintiff's complaint which was allowed yesterday.

Court: Any objection on the part of the plaintiff?

Mr. McCaffery, Jr.: The plaintiff objects to the amendment proposed to be filed on the grounds and for the reasons that the defenses therein set forth is not a defense of contributory negligence, but by its terms and language is a defense of assumption of risk; that the law is well settled that in the relationship of passenger and carrier, the law of assumption of risk does not apply, and that to permit its assertion at this time would only serve to encumber the record, it would be prejudicial error to the rights of the plaintiff; it does not have any consistency with the plea as already framed and made by the defendant in its plea of contributory negligence, and that if permitted, the defenses should be separated so that the defense of assumption of risk and that of contributory negligence could be separately attacked.

Court: Objection is overruled, and leave is granted to file the amended defense.

(The amendment permitted to be made to the answer is as follows:)

"That plaintiff saw and realized, or by the exercise of reasonable care should have seen and realized, that the floor surface between the seats in Section 12 was a bare composition floor instead of a carpeted floor. That if said floor rendered the footing insecure for the plaintiff while standing thereon [212] during travel, she knew and realized the same, or by the exercise of reasonable care should have done so, and should not have incurred the risk, if there was a risk, of standing and moving about on such floor without assistance."

Court: Proceed.

(Witness Jesse Love resumes the stand for continued direct examination by Mr. Pauly:)

(Last question read back by reporter as follows: Mr. Love, I ask you whether or not the sections in Touralux cars are equipped with a bell used for the purpose of summoning the porter?)

Court: The objection is overruled. You may answer.

A. They are.

Q. Would you describe in general what that bell system consists of?

A. The bell system consists of the service of the porter.

Q. I am asking you to describe the attachments that make up and constitute the bell system or buzzer system, whatever it might be. Do you understand what I want? A. No, I don't.

(Testimony of Jesse Love.)

Court: How does the system work?

A. The bell?

Court: Yes, how does the bell system work?

A. It is a bell you ring on the car. It consists —it has a regular box where it registers, and it is a service bell and to ring that bell, that signifies that the porter is wanted and [213] it registers at the far end of the car.

Q. (By Mr. Pauly): Does each section have a button? A. Each section has a button.

Q. Is that button part of the buzzer system or electric system? A. Yes, sir.

Q. Can you tell us where the button is located in the section with reference to any other objects located in the section?

A. Underneath the lights.

Q. I show you a photograph marked Defendant's Exhibit 1-A and ask you whether the button appears in that picture? A. It does.

Q. And where? A. Underneath each light.

Q. The photograph shows a light on the far wall both to the right and left of the window?

A. Yes, sir.

Q. And there is a black dot appearing in the photograph below each light. Are those the buttons you refer to?

A. That is the buttons I am referring to.

Q. Does the same appear in Defendant's Exhibit 1-D? A. It does.

Q. Is the system an electric system?

(Testimony of Jesse Love.)

A. How is that?

Q. Is the buzzer system an electric system? [214]

A. Yes, sir.

Q. And if the button is pressed, you say it registers in a box?

Mr. McCaffery, Jr.: Just a minute, we will object to the question as assuming a fact not in evidence, leading and suggestive.

Court: Sustained.

Q. If a button located in such section is pressed, what, if any, effect does that cause in the register to which you refer?

Mr. McCaffery, Jr.: To which we object on the grounds and for the reasons it is calling for a conclusion of the witness, no proper foundation has been laid by this witness which would qualify him to describe or detail what the effect of an impulse of the electric current to a box would be.

Court: Overruled. Answer the question.

Q. Do you understand the question?

A. I didn't get the question.

(Question read back by reporter.)

A. It registers 12, any particular section in the car, when the button is pressed.

Q. Any button located in any berth will always register 12?

A. Any button located in any section of the car, it registers from the section you press the button from.

(Testimony of Jesse Love.)

Q. If a button located in Section 1 is pressed, what number appears in the register? [215]

A. It registers 1.

Q. And if the button in Section 12 is pressed, what number appears in the register?

Mr. McCaffery, Jr.: Just a minute, to which we object on the ground and for the reason it is calling for a conclusion of the witness. This witness isn't qualified to draw any conclusion that a particular button will raise a particular section number, and it assumes that the system is in working order and that there is no possibility of connecting wires being mixed.

Court: Overruled.

(Question read back by reporter.)

A. 12.

Q. Does any sort of sound result from the pressing of a button in any section?

A. Any sort of sound?

Q. Yes.

A. Sure, it is something like a ring, only it is a charm.

Q. A chime? A. A chime.

Q. Or gong. A. A gong like.

Q. Would you say that it is a loud gong or soft, can you describe it?

A. It is loud enough to be heard all over the car.

Q. Is there any difference in the gong sound depending on whether the button in 1 is pressed or in 12? A. No, there is no difference.

(Testimony of Jesse Love.)

Q. The gong is always the same?

A. Yes, sir.

Q. But a different number appears in the register? A. Yes.

Q. Does the number in the register remain, or does it disappear after the button has been released?

A. It remains until I press a button to push it down.

Q. Where do you press that button?

A. Underneath the register, the box, the indicator.

Q. Where is the register box located?

A. It is located on the rear of the car near the gents' smoking room in the hall.

Q. Referring specifically to Car A-16 as carried as part of Train 16, leaving Seattle August 26, 1947, was that car equipped with such a gong system as you have described? A. Yes, sir.

Q. Was Section 12 in that car equipped with such buttons as you have described?

A. Yes, sir.

Q. And with such a regsiter; that is, was the car equipped with such a register as you have described? A. Yes, sir. [217]

Q. Was that system in working order, do you know, on August 26, 1947? A. Yes, sir.

Q. Would you tell us what is the purpose of that buzzer system?

Mr. McCaffery, Jr.: Just a minute. We will object to this on the ground and for the reason it is

(Testimony of Jesse Love.)

calling for a conclusion of the witness; that it is irrelevant and immaterial; that it is an attempt on the part of the defendant at this time by an indefinite question to lay prejudicial matter before the jury that we have not had a chance to object to.

Court: Read the question.

(Question read back by the reporter.)

Court: Sustained.

Q. Mr. Love, what would you do if a buzzer in any section were—if a buzzer in any section were pressed and a gong resulted, or if you observed as a result of that button being pressed a number exposed in the register?

Mr. McCaffery, Jr.: Just a minute, we will object to this as a compound question; secondly, we will further object on the ground and for the reason we are not interested in what Mr. Love does as a matter of custom or customarily, or under any hypothetical statement of facts; we are solely interested in what Mr. Love did on the 26th day of August, 1947, in answering any button pushed from Section 12, or the absence of [218] any button pushed, and no other set of circumstances, and for such reason any such answer would be irrelevant and immaterial and not within the issues of this case.

Court: Sustained.

Q. Mr. Love, on August 26, 1947, on Train 16, and in Car A-16, leaving Seattle, let me ask you

(Testimony of Jesse Love.)

whether or not any buzzers were pressed by any passenger in that car, do you know?

A. No, I don't remember.

Q. If a button in Section 12 had been pressed, and assuming, of course, that the buzzer system is in good working order and you were present, what would you have done?

Mr. McCaffery, Jr.: We will object to this on the same grounds as the objections previously made, on the grounds and for the reasons that what he would customarily do, or what the rules and regulations of the railroad company would indicate he should do under those circumstances is not a part of what he did at the time in question, or whether there was any occasion for him to do anything in answer to a buzzer, and that it is a question calling for solely negative testimony; it has no relation at all to any of the affirmative issues in this case.

Mr. Pauly: May it please the Court, I think counsel takes an unqualifiedly restricted view of the issues of the case and the purpose of the testimony. The question is asked for the purpose of showing what facilities were available and what [219] service would have been rendered if use had been made of the facilities available.

Court: That is speculative, isn't it, as to what service would have been rendered? I don't see; you first say, "Did the bell ring"? You say, "No." You say. "If the bell did ring, what would have been

(Testimony of Jesse Love.)

done"? It is purely speculative. I don't see it is of any assistance to the Court or jury here.

Mr. Pauly: It certainly—the buzzer system is there for a purpose. It is our purpose to show here what that purpose is. It concerns this particular person and what he would have done as part of his ordinary functions if use had been made of that system. It seems to me that that is strictly pertinent and material under the defense of contributory negligence. At that time, plaintiff here had at her disposal a bell system which would have summoned the porter and which she herself did not use, and which we, in our answer, allege constitutes contributory negligence on her part. We do not contend, of course, that she actually did use it. That is the entire point, the fact that she did not use it.

Court: You can show what his duties are with reference to the service he renders on the car, but what he would have done if the bell had been rung, which wasn't rung, is not admissible.

Q. Mr. Love, as porter on that car, will you describe in general what your duties consisted of?

A. What my duties consist of?

Q. Yes.

A. My duties in general consist of receiving passengers, taking down beds, discharging them, keeping the car clean, giving them such service as putting away bags and luggage and other things that is within the bounds of reason. That is my duties.

(Testimony of Jesse Love.)

Q. Do your duties include any conduct or action with regard to the buzzer system that you have described?

A. Yes, to answer the buzzer and see what the passengers want. If they want anything in the line of service that I can render to them and give them service the best that can be had to give to them. That is my general duties, practically, on the car.

Q. If a button in Section 12 were pushed or pressed, would it be a part of your duty to inquire what the occupant of that section desired?

A. Yes.

Q. If the occupant of Section 12 summoned you by using that bell system and requested you to hang up a hat, would you consider it a part of your duties to comply with that request?

Mr. McCaffery, Jr.: To which we object on the grounds and for the reason that it is assuming a state of facts not in evidence; that it calls for conjecture of the witness; that the element of whether or not the porter were present in the car [221] to render the service is not laid before the witness in the question; that it calls for a recitation of what he would customarily do; that it is negative testimony and has no probative value so far as the issues of this case are concerned.

Mr. Pauly: I think counsel misunderstood the effect of the question. I have asked him if he would consider it a part of his duties to do so; I didn't ask him if he would do it?

(Testimony of Jesse Love.)

Court: Do you have any further objection?

Mr. McCaffery, Jr.: No, I have made mine.

Court: Objection is sustained.

Mr. Garlington: Your Honor, in view of the Court's ruling, we would like to submit an offer of proof.

Court: Very well.

DEFENDANT'S OFFER OF PROOF No. 1

"The defendant offers to prove by the witness Jesse Love that the car A-16 Touralux on which the plaintiff was riding was equipped with an electric bell signal system by which the plaintiff riding in Section 12 could have pressed a button near each seat light in the section which would have sounded a signal to the porter. That had the plaintiff pressed the bell signal button, the porter was in the car and would have responded to her signal, and would have hung up the plaintiff's hat and coat and assisted her in any such respect that she might have requested."

Mr. McCaffery, Jr.: The plaintiff objects to the offer of [222] proof—I take it it is the Defendant's Offer of Proof No. 1?

Court: It will be Offer of Proof No. 1.

Mr. McCaffery, Jr.: On the following grounds and for the following reasons: first, that on the offer of proof assumes a state of facts which have not been shown to exist by the evidence; in fact

(Testimony of Jesse Love.)

some of the testimony that has gone in by the defendant's own witnesses show the very high probability that the porter was not present in the car. The offer of proof is further objected to on the grounds and for the reasons that it is negative testimony in this: that it assumes what would have been done if the porter were present in the car and if the plaintiff or someone in her behalf had rung a bell and if, under his own language, the porter felt that it was in the bounds of reason, he would respond to the bell. Further, that it raises issues not framed by the pleadings and proposes testimony irrelevant to the issues here framed.

Mr. Pauly: As to the first two points, your Honor, the testimony has already clearly indicated here, as given by Mr. Love himself, that he was present in the car at all times from the time he left Seattle until the time he was first informed by some stranger that this woman had been in an accident, except for the time he was on the station platform at Renton. As to counsel's statement that it depends upon the witness' attitude as to whether he deemed it reasonable to respond to the signal, it is not supported by the testimony. There was [223] nothing said regarding that at all by the witness. He testified, if my memory serves me correct, it was part of his duty to respond and inquire what the passenger wanted, and in addition, to comply with any reasonable request, but not that he would respond to the call, alarm, or signal if he deemed it rea-

(Testimony of Jesse Love.)

sonable. To that extent, counsel has misunderstood the evidence in at least two respects. As to the materiality of the defense, it is pertinent (Interrupted).

Court: Isn't the purpose of the evidence here to show what services were available, is that right?

Mr. Pauly: Yes, your Honor, and to show, if admitted, if the button was pressed, he would go and inquire what the passenger wanted, and if requested to hang up the coat, then to determine from him what he would have done.

Court: I don't know, and no one knows whether or not the porter would respond to any particular signal, and for you now to come in and have the porter testify of course he would is not competent evidence. As I see it, you have set up the facilities that are available and his duties with reference to it.

Mr. Pauly: He has testified he has been a porter, I believe, for 27 years, and I believe that it is entirely proper in the light of that to ask him what does he generally do in such a situation and what he would have done here if use had been made of that button—yes, precisely to show what facilities [224] were available to the plaintiff.

Mr. McCaffery, Jr.: If the Court please, further, I anticipated something like this when I prepared my brief, and I have given the Court authorities on the admissibility of evidence of customs and customary activities of porters and people of that nature. This is trying to establish by conjecture

(Testimony of Jesse Love.)

what he would have done; it is negative testimony of the first water; it has no probative value. We insist on those two grounds, that to establish by custom what he would have done is not within the issues of this case. They are merely trying to put in what they can argue to the jury. They have shown what the custom is, let them argue that to the jury.

Court: The objection is sustained. Is that the ruling with reference to the offer of proof No. 1?

Mr. Garlington: That is our understanding.

Court: The objection to the offer is sustained.

Q. Directing your attention, Mr. Love, to the time during which the train that we are referring to, to the time that elapsed between the time that train left Seattle and the time when this stranger informed you Mrs. Harrington had been in an accident, let me ask you in general what you were doing during that time?

A. I was back in the rear of the car straightening out some linen in the locker at the particular time.

Q. At the particular time of what? [225]

A. That the accident occurred.

Q. Previous to that time and between that time and the time you left Seattle, what had you been doing in general?

A. Placing away baggage and straightening passengers out in the seats.

Q. You were in the car at all times except for

(Testimony of Jesse Love.)

the time you were on the station platform at Renton, were you?

Mr. McCaffery, Jr.: To which we will object as leading and suggestive.

The Court: Sustained.

Q. Do you know, Mr. Love, whether during any part of that time from the time you left Seattle until you first learned of the accident—withdraw the question. During the time from the time the train left Seattle and the time you first learned of Mrs. Harrington's accident, let me ask you if you were on your feet during all that time?

A. I was.

Q. Do you recall whether or not during the time the train traveled from Seattle to the time when you first learned of Mrs. Harrington's accident, whether any unusual lurches or jerks occurred in the motion of the train? A. I do not.

Q. Do you recall whether there were any sudden or unusual jerks in the movement of the train as it left Renton? A. No, sir. [226]

Cross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Love, with whom have you talked concerning the evidence which you were going to give in this case?

A. I didn't get the question.

(Question read back by reporter.)

A. No one.

(Testimony of Jesse Love.)

Q. You haven't talked to a soul?

A. No, sir.

Q. You haven't talked to Mr. Pauly, counsel for the defendant?

A. I have talked to him, but I didn't tell him what I would give in evidence.

Q. You didn't tell him what you were going to say here? A. No.

Q. He put you on the stand without talking to you? A. Yes, sir.

Q. Did you talk to any of the train crew, Mr. Love?

A. Did I talk to any of them concerning this?

Q. Yes.

A. I talked to the conductor after it happened.

Q. After it happened? A. Yes, sir.

Q. Have you talked to him since you were subpoenaed here as a witness?

A. Not concerning that; we talked that over before. [227]

Q. And, if I understand you correctly at this time, Mr. Love, you have not talked with anyone, the investigator for the railroad company, the attorney for the railroad company, or any members of the train crew concerning the evidence which you were going to give in this case?

A. No, sir.

Q. Now, Mr. Love, do you recall the time that you left Seattle on the 26th day of August, 1947?

A. Yes, sir.

Q. What time?

(Testimony of Jesse Love.)

A. I think it was around 2:45 the time the train left Seattle.

Q. Do you recall the number of persons who were riding in your car?

A. No, sir.

Q. What did you say? A. No, sir.

Q. What time after your departure from Seattle, Mr. Love, do you usually go to lunch?

A. Four o'clock.

Q. Four o'clock. And the dining room is open to the public at which time?

A. Five o'clock.

Q. Mr. Love, if there is a commotion in your car, and you are there, you would be aware of it, wouldn't you? A. If I know it, yes. [228]

Q. I am not relegating this, Mr. Love, to your actually seeing it—— A. Yes, sir.

Q. If there were a commotion in your car, you would be aware of it, wouldn't you?

Mr. Pauly: Just a minute. We should like to object to this as calling for speculation as to what would have gone on in line with the objection of counsel as to the testimony of things that might or might not have occurred, and which the Court has already ruled may not be brought into evidence. We further object for the reason it would be improper cross-examination since those matters were excluded.

The Court: Sustained.

Q. Mr. Love, was there any commotion on your

(Testimony of Jesse Love.)

car between the time when you left Seattle and the time when you were called by the conductor or told by the stranger that Mrs. Harrington had had a fall? Was there any commotion in the car?

A. Yes, there was, yes, sir.

Q. That is the point I am trying to get at. Did you respond and immediately go to the scene of the commotion?

A. After I was told, I did.

Q. I see. That is all I wanted to know. Now, during that period of time, Mr. Love, in August of 1947, travel was very heavy, was it not?

A. Yes, sir. [229]

Q. Your duties were very onerous at that time—withdraw that. Your duties were very heavy, you were working all the time, weren't you?

A. Yes, sir.

Q. Many passengers wanted considerable service, is that correct? A. Yes, sir.

Q. How is it, Mr. Love, that you can definitely say to this Court and this jury that there was no one seated in Section 12 when you came on the section with Mrs. Harrington and her daughter?

A. Why, there wasn't.

Q. And you remember that very distinctly?

A. Yes, sir.

Q. You also remember taking them on to the car A-16? A. Yes, sir.

Q. And you remember distinctly having seated Mrs. Harrington and her daughter?

(Testimony of Jesse Love.)

A. Yes, sir.

Q. And you looked at their travel tickets and accommodations? A. Yes.

Q. It is customary that you do so as they come to the train, isn't it? A. Yes, sir.

Q. But you do not remember escorting them from the platform [230] to the car?

A. Yes, sir.

Q. Now, you ride that train how often, once a week a complete trip back and forth or (interrupted).

A. Well, I did every eight days.

Q. Every eight days and you are willing to testify that you don't recall a jerk on this particular trip? A. Yes, sir.

Q. Do you recall a jerk on any trip?

A. On any trip?

Q. Yes. A. Sure.

Q. Which trip would you recall a jerk on?

A. I don't quite get you.

Q. Just tell me one trip you recall a jerk on.

A. Sometimes it is a little jerk, but it is a very smooth train.

Q. A very smooth train? A. Yes, sir.

Q. If there were a severe jerk, it would be unusual, wouldn't it, Mr. Love? A. Yes, sir.

Q. Do you recall the length of the stop at Renton on that day? A. Yes, sir.

Q. How long was it? [231]

A. We stopped there a couple of minutes, I suppose.

(Testimony of Jesse Love.)

Q. Did you open your vestibule door and put down your (interrupted).

A. I stepped down.

Q. What do you call that?

A. Stepping box.

Q. Stepping box. You put that out?

A. I didn't put it out, there was no one coming back.

Q. But you yourself did get down on the platform that day at Renton? A. Yes, sir.

Q. Now, at Renton, Mr. Love, you say you got out? A. Yes, sir.

Q. Then, you would get out at that section of the train or your car beyond Section 14, wouldn't you? A. Yes, sir.

Q. You testified, Mr. Love, that you were back at your linen box when this person told you that Mrs. Harrington had had a fall? A. Yes, sir.

Q. Your linen box is beyond Section 2 to the forward end of the train? A. Rear end.

Q. The rear end. Then, Mr. Love, in order to get back on the train and get back to your linen box, you had to pass the [232] section in which Mrs. Harrington was seated? A. Yes, sir.

Q. You observed nothing?

A. Nothing.

Q. You went right by? A. Yes, sir.

Mr. McCaffery, Jr.: That is all.

(Witness excused.)

CARROLL P. PARKER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. Carroll P. Parker.

Q. Where do you live?

A. Seattle, Washington.

Q. Are you employed by the Milwaukee Railroad? A. I am.

Q. In what capacity? A. Conductor.

Q. What kind of conductor?

A. Train conductor.

Q. Were you so employed in August, 1947? [233]

A. I was.

Q. How long have you been employed by the Milwaukee Railroad as train conductor?

A. I beg your pardon.

Q. How long have you been employed by the Milwaukee as train conductor?

A. Since November, 1909.

Q. You have been train conductor continuously since 1909?

A. Well, that was my date. Of course, there was times when I was on the extra list, but I have been continuously employed quite a number of years.

Q. As train conductor? A. Yes.

Q. Your service date begins as train conductor in 1909? A. Yes, sir.

(Testimony of Carroll P. Parker.)

Q. You have been regularly employed since then as train conductor? A. Yes, sir.

Q. State whether or not you were a train conductor on train 16 leaving Seattle August 26, 1947?

A. I was.

Q. Do you recall that is the train on which Mrs. Harrington claims to have suffered an accident?

A. I do.

Q. Did you yourself see the accident? [234]

A. I did not.

Q. How did you first learn there had been such accident? A. Mr. Nolan informed me.

Q. Who was Mr. Nolan?

A. The sleeping car conductor.

Q. Do you know how long it was after leaving Seattle that you were so informed by Mr. Nolan?

A. I do not.

Q. Do you know where the train was when you first were informed by Mr. Nolan the accident had occurred?

A. I can't recall that, either.

Q. Do you recall what you were doing at the time you were so informed by Mr. Nolan?

A. I don't recall that right at this time.

Q. What is your ordinary practice after leaving Seattle, what would you do?

A. I start lifting the tickets in the day coaches.

Q. Is that part of your ordinary functions?

A. Yes, it is.

Q. Do you collect tickets in the day coaches?

(Testimony of Carroll P. Parker.)

A. Yes, sir.

Q. As conductor, let me ask you if you have general authority and responsibility over the train?

A. I do.

Q. Is that restricted to the day coach section, or does it [235] extend to the entire train?

A. Entire train.

Q. Do you know what cars made up your train on that day? A. I do.

Q. Would you please tell us what cars were in the train and list them in the order in which they were placed, beginning with the locomotive and moving toward the rear?

A. Mail and express car, dormitory car, three coaches, tap, or club car, as it is sometimes called, three tourist cars, dining car, standard sleeper and sleeper observation car.

Q. After leaving Seattle you boarded the train at the head end? A. Yes, sir.

Q. And collected tickets? A. Yes, sir.

Q. How long does that ordinarily take you to collect tickets in the day coach section?

A. Depending on the load, it figures any time from 30 minutes on, depending on how heavy the load is on the cars.

Q. Do you recall whether you were still collecting tickets at the time Mr. Nolan informed you Mrs. Harrington had been in an accident?

A. I don't recall, no.

Q. What did you do upon being informed by

(Testimony of Carroll P. Parker.)

Mr. Nolan that there had been an accident? [236]

A. I went back to see what the nature of the accident was and inquire, get what facts I could of the nature of the accident and how badly the person was injured if it could be determined.

Q. Where did you go?

A. I went back to car A where the passenger was.

Q. Do you recall who else was there at the time you arrived?

A. No, I don't recall now who was there.

Q. Mrs. Harrington was there, of course?

A. Yes, she was.

Q. Was her daughter there, do you know?

A. I don't know definitely. I think she was, but I don't know definitely.

Q. Mr. Nolan was with you, was he not?

A. Yes.

Q. Anybody else that you recall?

A. No, I don't recall now.

Q. Reference has been made here to a person as being dressed in gray and who was referred to as Passenger Representative. Do you know whether there was any such person on the train that day?

A. I don't recall that.

Q. Are you familiar with Passenger Representatives in general?

A. They are generally on the trains—they were when they put that train on. They were on there for two or three months, but they are not on there

(Testimony of Carroll P. Parker.)

now, and they were merely on there to observe, more to acquaint themselves—— (interrupted).

Mr. McCaffery, Jr.: Just a minute, please, Mr. Parker. We would like to have anything he would further say stricken as not responsive to the question.

The Court: It isn't responsive. Ask a direct question if you want to elicit some information and give counsel an opportunity to object.

Q. Just confine your answers to my question. I will ask you now was a passenger representative ever a part of the train crew itself?

A. No.

Q. Could the Passenger Representative at the time there was such person riding on the train have anything to do with respect to the operation of the Train 16? A. None.

Mr. McCaffery, Jr.: To which we will object as irrelevant, immaterial; it doesn't prove or tend to disprove any of the issues in the case.

The Court: What is the purpose of it?

Mr. Pauly: To show simply, your Honor, the fact of the matter is, if I may be permitted to indicate it, and to shorten this matter, maybe counsel will agree that the Passenger Representative wasn't part of the train crew or an official on this train; he was a passenger just like anyone else.

The Court: The testimony is that he was performing official [238] duties on the train.

Mr. Pauly: To this extent, and this is what I in-

(Testimony of Carroll P. Parker.)

tended to elicit from this witness: It is a fact he is a representative of the railroad at other points, just like reference has been made to Mr. Tansley in San Francisco. When the train was first put on, it was thought advisable to have Passenger Representatives take a trip on the train to advise themselves of the facilities. That was his purpose. He was a salesman. He had no duties to perform there except to inform himself regarding the facilities. I think an impression has been created that he was a person such as compared to the train conductor and himself had some duties to perform on this train. Frankly, we have no such person here, and I don't like to create the impression that there is some party here who would have some bearing on the case that we haven't presented. He was like any other passenger.

The Court: I don't see whether it is material whether the Passenger Representative was on the train or not on the train. I don't see it is of any importance one way or the other.

Mr. McCaffery, Jr.: We will admit that for the purpose of this examination under the circumstances, why he was there, and in that capacity as stated by Mr. Pauly.

Mr. Pauly: All right.

The Court: Very well.

Q. Did you have any conversation with Mrs. Harrington, Mr. [239] Parker?

A. Yes, I did.

(Testimony of Carroll P. Parker.)

Q. When?

A. When I went, was called back to her section.

Q. Did she make any explanation as to what had happened?

A. She had slipped and fallen in her section there.

Q. Was any reference made by her to any jerk? A. Not that I recall.

Q. Did you have any conversation with Miss Harrington, the daughter, do you know?

A. I don't recall that I did that.

Q. Did you inquire as to when the accident had occurred? A. Yes, I tried to.

Mr. McCaffery, Jr.: Just answer the question.

Q. Was any reply made by Mrs. Harrington as to when it had occurred?

A. She didn't know definitely.

Q. Did you, Mr. Parker, inquire as to whether or not any of the passengers in the vicinity had witnessed the accident? A. I did.

Q. Were you able to ascertain the names of any people who had witnessed the accident?

A. I found none who had witnessed the accident.

Q. None at all, A. None at all. [240]

Q. What else did you do while you were there at Section 12, Mr. Parker, if anything?

A. I inquired, made inquiries. I made inquiries as to what happened and tried to determine the approximate time that it happened and asked those questions of Mrs. Harrington.

(Testimony of Carroll P. Parker.)

Q. Did I understand you were not able to fix the time? A. No, we weren't.

Q. Do you recall whether the porter was in the car at the time? A. No, I don't.

Q. Did either Mrs. Harrington or Miss Harrington at that time request any medical attention?

A. They did not.

Q. Did you offer to provide any medical attention? A. Yes, sir.

Q. What did they say in answer to your offer to provide medical attention?

A. They didn't feel it was necessary.

Q. Did either Mrs. Harrington or Miss Harrington request that the berth be made down?

A. Not to me.

Q. Well, did they to anybody else that you know of?

Mr. McCaffery, Jr.: Just a minute, in your presence.

Q. In your presence at that time?

A. No.

Q. Did you make any inquiry as to whether they wished to have [241] the berth made down at that time? A. No, I did not.

Q. Do you know whether anybody else in your presence made inquiry of them whether they wanted the berth laid down at that time?

A. Not that I heard.

Q. Did you, at any later time, receive a request, either from Mrs. Harrington or Miss Harrington,

(Testimony of Carroll P. Parker.)

or from anyone else, to arrange for medical attention for Mrs. Harrington? A. Yes, sir.

Q. By whom were you requested to do so?

A. The sleeping car conductor.

Q. How long afterwards was that after you first went down to Section 12?

A. I don't recall now.

Q. Can you tell us approximately at all?

A. No, I don't recall how long afterwards.

Q. Did you arrange for medical attention?

A. I did.

Q. How?

A. By sending a message to Spokane to have the doctor meet the train there.

Q. Do you know where that message was sent?

A. Where I put the message off?

Q. Yes. [242] A. At Othello.

Q. Did a doctor afterwards meet the train at Spokane in accordance with your request?

A. I understand there was.

Q. You didn't see him?

A. No, I didn't see him.

Q. Mr. Parker, directing your attention to the time that elapsed between the time the train left Seattle and the time you first learned Mrs. Harrington had been injured in an accident, let me ask you whether you remember whether the train suffered any unusual jerks or lurches of any kind?

A. It did not.

Q. Did the train stop at Renton, do you know?

(Testimony of Carroll P. Parker.)

A. Yes, sir.

Q. Do you know whether or not there was any unusual or extraordinary lurch or jerk as the train left Renton? A. There wasn't.

Mr. Pauly: That is all.

Cross-Examination

By Mr. Myers:

Q. Mr. Parker, with whom have you discussed your testimony in this case?

A. With our attorneys.

Q. With the attorneys? [243]

A. Yes.

Q. Was this prior to your being subpoenaed in this case or was it afterwards?

A. Afterwards.

Q. Has there been a discussion within the last few days? A. Yes, sir.

Q. With your attorneys was this discussion individual, or were other members of the train crew present?

A. There were other members present.

Q. Was Mr. Love present?

A. No, Mr. Love was not present.

Q. Where was Mr. Love at that time, do you know? A. I wouldn't know.

Q. Were all other members of the crew present except Mr. Love? A. No, sir.

Q. Which ones were present?

A. We have had several discussions and different members at different times.

(Testimony of Carroll P. Parker.)

Q. Have you discussed the testimony in the case generally with other members of the train crew in the absence of your attorneys? A. No.

Q. There has been no discussion among any of you at any time relative to this case?

A. There has been discussions, but not relative to the testimony. [244]

Q. You have, however, within recent days discussed the case with other members of the train crew? A. I have.

Q. Have you discussed it with Mr. Love?

A. Yes, I have.

Q. Have you discussed various facts of the case as in your own mind they came out with Mr. Love? A. No, I wouldn't say that.

Q. But there has been discussion of what the facts of the case were with Mr. Love, is that right?

A. Yes.

Q. You say you have jurisdiction over the entire train, is that correct? A. Yes, sir.

Q. And when the train left Seattle on the day this accident occurred, you were lifting tickets in the day coaches? A. That's right.

Q. But you don't remember how long it was before you were told of the accident by Mr. Nolan?

A. No.

Q. You don't have any idea how long that was?

A. No.

Q. Do you remember which of the three coaches you were in at the time he came to get you? [245]

(Testimony of Carroll P. Parker.)

A. No, I don't.

Q. You don't remember that? A. No.

Q. You went back with Mr. Nolan to Car A-16 to check on the accident? A. Yes, sir.

Q. You don't remember whether Miss Marjory Harrington was there at the time or not?

A. No.

Q. You don't remember whether Mr. Love, the porter, was there?

A. No, I don't recall that.

Q. You don't recall whether the Passenger Representative, to whom there has been some reference in this case, was there at the time?

A. No, I don't recall that.

Q. You don't remember whether Mrs. Harrington made any reference to a jerk in connection with her fall? A. I don't recall she did.

Q. As a matter of fact, your recollection of that incident is pretty vague, isn't it?

A. I beg your pardon?

Q. Your recollection of that whole incident and surrounding circumstances is pretty vague; it was some time ago and your memory has faded quite bad? A. Yes. [246]

Q. Do you recall how long you talked to Mrs. Harrington when you first went into the car?

A. I don't recall that.

Q. After your conversation with her, you proceeded to look for witnesses, is that correct?

A. Yes.

(Testimony of Carroll P. Parker.)

Q. Most of the time you were in the car, you were asking other people in the car if they had seen the accident? A. Yes.

Q. You checked all of them?

A. Not all of them.

Q. You asked all you could see there at the time?

A. That's right.

Q. And none of them had seen the accident?

A. That's right.

Q. After this visit to Car A-16, did you return to it at any time? A. Yes, sir.

Q. Did you return to see Mrs. Harrington, or was it in connection with other matters?

A. In connection with other matters and—yes, in connection with other matters.

Mr. Myers: That is all.

Court: Just a minute. What are your duties, Mr. Parker, on the train with reference to the train when it comes to a [249] station and stops?

A. That would depend on what that stop was for. If it were just general, I would supervise to see if we have passengers to put off, usually.

Court: See that the passengers supposed to get off, do get off?

A. And if there is any to load.

Court: Is it your responsibility to start the train then?

A. Yes, it is, well, it is if I am available, but if I am back in the train, the trainmen, they are up

(Testimony of Carroll P. Parker.)

ahead loading or unloading passengers, as at Renton, they are qualified to start that train.

Court: You didn't get off at Renton on that trip?

A. I did not.

Court: You recall that definitely, do you, that you didn't get off there?

A. Yes, I do.

Court: Does anything in particular call it to your mind that you didn't get off there on that day?

A. Yes, because I usually go to the vestibule, I always do, and open it and look up ahead. I don't step off on the ground. I do look up to the head, and if I am not there in person, I am up there where I can look back.

Court: Did you do that on this trip?

A. Yes, sir. [249]

Court: Any further questions?

Mr. Pauly: No.

Mr. Myers: Just a moment.

Court: What time was it when you went back and saw Mrs. Harrington?

A. I don't recall that.

Mr. Myers: Your Honor, I wonder if we might ask another question in connection with the Renton stop?

Court: Yes.

Q. (By Mr. Myers): Do you recall how long the stop was at Renton, Mr. Parker?

A. No, I don't.

(Testimony of Carroll P. Parker.)

Q. Do you know whether any passengers were discharged or picked up at Renton?

A. There were none discharged, and there were some picked up.

Q. There were some picked up? A. Yes.

Mr. Myers: That is all.

(Witness excused.)

(15-minute recess.)

GEORGE EDWARD TIERNEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows: [250]

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. George Edward Tierney.

Q. Where are you from?

A. Tacoma, Washington.

Q. Are you employed by the Milwaukee?

A. Yes, sir.

Q. In what capacity? A. Engineer.

Q. What kind of engineer?

A. Locomotive engineer.

Q. How long have you been so employed?

A. I was a locomotive engineer in 1906.

Q. Have you been a locomotive engineer ever since? A. No, sir.

Q. Explain your answer.

A. Business slacked up in the spring of 1907,

(Testimony of George Edward Tierney.)

and I had to fire until they started to build the extension.

Q. How long have you been continuously employed as a locomotive engineer by the Milwaukee?

A. I have done no firing since August 7, 1907.

Q. Have you been an engineer since then?

A. Yes.

Q. Were you a locomotive engineer on Train 16 leaving Seattle [251] August 26, 1947?

A. Yes, sir.

Q. Are you now an engineer on the Olympian Hiawatha? A. Yes, sir.

Q. Have you been an engineer on that train ever since the train was started in June, 1947?

A. Yes, sir, I went out the second day.

Q. Over what division or territory do you act as locomotive engineer on that train?

A. From Tacoma to Othello.

Q. How far is Othello from Seattle?

A. 189 miles, approximately. There may be a few tenths one way or the other.

Q. Do you have a schedule prescribed for that train as it operated August 26, 1947?

A. Yes, sir.

Q. Do you have it at hand? A. Yes, sir.

Q. Briefly, will you tell us what time the train was scheduled to leave Seattle? A. 2:45.

Q. Did it leave on time that day?

A. Yes, sir.

Q. What time was it scheduled to arrive at Renton? A. 2:09—3:09, excuse me. [252]

(Testimony of George Edward Tierney.)

Q. What is the distance from Seattle to Renton?

A. It is approximately 12 miles.

Q. Are there any stops made between Seattle and Renton? A. No, sir.

Q. What is the next stop after leaving Renton?

A. Othello.

Q. That is the end of the division?

A. Yes, sir.

Q. Do you know whether or not that train on that day made any unscheduled stops?

A. They made no unscheduled stops.

Q. Will you explain how you know that? Are you testifying from personal recollection or what?

A. No, sir.

Q. What is your answer based on?

A. For the purpose of the Master Mechanic, the engineers make a delay report. It is for the purpose of showing the efficiency of the engine, and on any stop that is not scheduled, we put down there a delay to give him credit.

Q. Do you report on there every stop of every kind whatsoever and regardless for what purpose?

A. No, sir, not a regular stop.

Q. I mean any unscheduled stop?

A. Any unscheduled stop, yes, sir.

Q. Did you make out a delay report of any kind for that trip? [253] A. Yes, sir.

Q. Do you have it with you? A. Yes, sir.

Q. Let me see it. Is that your handwriting?

A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. Does it show any stops at all made by the train on that trip? A. No, sir.

Mr. McCaffery, Jr.: Just a minute.

Mr. Pauly: Were you going to enter an objection?

Mr. McCaffery, Jr.: I think the witness had very definitely evidenced a personal knowledge, which the use of a memorandum to refresh his recollection is not indicated.

Mr. Pauly: I am trying to develop the fact his testimony is based on his personal memorandum.

Mr. McCaffery, Jr.: I think he has indicated ability without the memorandum.

Court: Are you testifying with reference to the stops from your memory?

A. It was from this. I couldn't remember back two years and a half. I don't even remember this trip.

Q. Was the memorandum made out by you at the conclusion of that trip? A. Yes, sir.

Q. Was it correctly made out at the time? [254]

A. Was it what?

Q. Was it correctly made out?

A. Yes, sir.

Q. That memorandum shows, does it not, that there were no stops?

Court: Here I think you are confusing the purpose of the memorandum. I think the witness is not using the memorandum to refresh his recollection; he has no memory of the trip at all.

(Testimony of George Edward Tierney.)

Q. We will approach it this way: I show you a sheet marked Defendant's Exhibit 3, and ask you if that is made out in your handwriting?

A. Yes, sir.

Q. Is that the delay report you have just referred to? A. Yes, sir.

Q. Does it show any stops made by train 16 between Seattle and Othello on the run leaving Seattle August 26, 1947? A. No, sir.

Q. If any unscheduled stop had been made by that train, you would have reported it on that sheet?

A. Yes, sir.

Mr. McCaffery, Jr.: Just a minute. We ask that the answer be stricken.

Court: It may be stricken.

Mr. McCaffery, Jr.: We object on the grounds and for the [255] reason it is calling for a conclusion of the witness; it is based upon custom and not what actually happened. Let him state what actually happened.

Court: Objection will be sustained at this point to further elicit the way he made the report, what happened, what he did.

Q. When was the report made out, Mr. Tierney?

A. In Othello.

Q. When?

A. That night when I got in, I had to check in at Othello where I made the reports out for that train, and then turned it in when I got back to Tacoma.

(Testimony of George Edward Tierney.)

Q. Is that turned in where? A. Tacoma.

Q. To whom? A. Master Mechanic.

Q. Of the Milwaukee Road?

A. Yes, sir.

Q. Is that such a report as you are required to make as engineer? A. Yes, sir, in every trip.

Q. Made in the course of the performance of your duties? A. Yes, sir.

Q. If any stop, unscheduled stop, had been made by you on that trip, would you have so noted on this report? [256] A. Yes, sir.

Mr. Pauly: We offer Exhibit 3 in evidence.

Mr. McCaffery, Jr.: Let me see it, Harry, please? May I ask in connection with this, if the Court please?

Court: Surely.

Examination

By Mr. McCaffery, Jr.:

Q. Is it not a fact, Mr. Tierney, that a ticker tape is run on your whole trip?

A. A ticker tape?

Q. Yes. A. Yes, sir.

Q. That describes precisely the movements of the train? A. Yes, sir.

Q. As to speed, stops, time and other elements?

A. Not the time.

Q. Would you say that would be an accurate record of the trip, the ticker tape?

A. Yes, sir.

Q. That is mechanical, isn't it, Mr. Tierney?

(Testimony of George Edward Tierney.)

A. The ticker tape is mechanical. If it is correctly adjusted, it would give an accurate account of the trip.

Mr. McCaffery, Jr.: We will object to the exhibit offered at this time, and its admission in evidence, on the grounds and for the reasons that it is not the best evidence. It is a self-serving declaration, but this objection does not go to the use [257] of the memorandum by the witness to refresh his recollection.

Court: It is of no value for that purpose because he has no recollection.

Mr. Pauly: Regarding the objection made as not being the best evidence available, there is no showing made and it is not a fact that any ticker tape is available.

Mr. McCaffery, Jr.: I think it is up to them to show where the ticker tape is.

Mr. Pauly: No, on the basis of the evidence, it is not. Certainly it is up to them to show—— (interrupted).

Court: I don't think the objection to it based on the basis it isn't the best available evidence can be sustained. It is admitted for what it is worth. It is for the jury, under instructions of the Court, to decide its value and weigh it. The objection to the admission is overruled. Defendant's Exhibit 3 is admitted.

(Testimony of George Edward Tierney.)

DEFENDANT'S EXHIBIT 3

"Form 188
'78 Report'
Passenger Train Delay Report

8-26 1947

To Train Dispatcher

A	Train No. 16 Engine No. 6		
B	Left Tacoma (Starting Point)	OT (Time Late)	
C	Arrived Othello (End of Run)	OT (Time Late)	
D	Delayed at Mile Post 2079 (Station)	5 min. (Time)	Slow order (Cause)
	Renslow to Boyleston	7 min.	No. 264
F	Remarks: 12 cars.		
		s/ Geo. Tierney	Engineer Conductor

Note.—Passenger Train Engineers will fill out this report and leave with operator at end of run. All delays in excess of the schedule or usual stop must be reported, such as getting orders, passing trains, at stations loading baggage, mail and express, hot bearings on engine or cars, etc., giving location and time delayed. Operator will telegraph report to Train Dispatcher promptly using signal '78' and letters A, B, C, D and F for lines as indicated.

Filed Oct 25, 1949, H. H. Walker, Clerk, By D. F. Holland, Deputy."

Direct Examination
(Resumed)

By Mr. Pauly:

Q. Mr. Tierney, do you know whether or not the train on that day operated on time and in accordance with the schedule prescribed for it?

A. That's right.

Court: Counsel, I don't want to inject the Court too much into it, but the witness has testified, has

(Testimony of George Edward Tierney.)

he not, that he has no recollection of this trip. Is not that the evidence? That is the way I understood it.

Mr. Pauly: I just asked him whether or not he knows whether the train on that day operated in accordance with the schedule. I don't know whether his previous answer covers that situation, your Honor.

Court: I will permit the answer at this point.

Mr. Garlington: I think it appears from the Exhibit 3, if these hieroglyphics can be properly interpreted.

Court: It is admitted for the jury, but he has no recollection of it, he says.

Mr. Pauly: My last question was whether or not he knows whether the train was on schedule.

Court: He has already said he doesn't; he doesn't have any recollection of the trip.

Mr. Pauly: Your Honor, a broad general statement that he has no recollection of the trip, I don't know whether that is intended to cover this: Was the train on schedule or not? That is what I intended to elicit from the witness. Do you know of your own knowledge whether or not the train was operated on schedule?

A. My work report, delay report, says it was.

Q. Will you explain how it shows that?

A. It says, "Left Tacoma on time."

Q. Does it say, "on time." A. O.T.

Q. That stands for on time? A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. What else?

A. What else? It says, "Othello, on time."

Q. Does it show anything with regard to what the time of the train may have been at any point between Tacoma and Othello? [260]

A. No, sir.

Q. The statement on Exhibit 3, "Mile post 2079, five minutes," what is that following that?

A. Slow order.

Q. What does it say following that?

A. Renslow to Boyleston, 7 minutes, No. 264. That means they were ahead of us and we had to slow up to allow them to clear.

Q. Where is Renslow?

A. The second station out of Ellensburg.

Q. East or West? A. East.

Q. Approximately how many miles from Seattle?

A. From Seattle, 90 and——(interrupted)

Q. Approximately?

A. It would be 115, 121—between 125 and 130 miles.

Q. Other than as shown by Exhibit 3 there, are you able to tell us of your own knowledge whether or not Train 16 operated on schedule at points located between Seattle and Othello?

A. Yes, sir, outside of there might have been a minute or two late on account of the five-minute slow order; that would naturally retard the train.

Q. That would be after the train was at a point East of Seattle?

(Testimony of George Edward Tierney.)

A. No, that is just out of Cle Elum.

Q. How far is Cle Elum from Seattle?

A. It is 89. [261]

Q. Except for those two delays, the train was otherwise on time? A. As far as I know.

A. Is that correct? A. Yes, sir.

Court: I would like to clear this up, counsel, for the benefit of the jury. Do you remember this, that the train was on time at any particular point?

A. This particular trip?

Court: Yes.

A. No, sir.

Court: The witness has said he has no recollection of the trip.

A. There was nothing unusual happened on the trip.

Q. (By Mr. Pauly): Do you know what kind of a locomotive you had that day, Mr. Tierney?

A. Yes, sir, a Diesel locomotive.

Q. Can you further identify it as to type?

A. Fairbanks-Morse Diesel, three unit.

Q. Is that a large or small engine?

A. Large.

Q. Is it a new or old engine?

A. It was a new engine.

Q. Would you describe it as to general type as being a Diesel-Electric? [262] A. Yes, sir.

Q. And would you describe to us how the train is put in motion, with what facilities is the train put in motion?

(Testimony of George Edward Tierney.)

A. Well, you see, there is three units to the Diesel, and each one is separate, but they are operated by the same control.

Q. Yes.

A. And when you are standing, your Diesel engine is idling at about 300 revolutions, between 300 and 315, and you place your throttle on the first notch—you have eight notches. The first notch does not speed your engine up, but merely connects what electricity you have, throws it to the traction motor which propels the Diesel.

Q. And puts it in motion.

A. Puts it in motion. If one notch isn't enough, which is not very likely, you put it in the second, and that speeds your engine up and you bring up a little more voltage.

Q. As the control is moved from one notch to the next and on up to the eighth position, do I understand more power is applied to the wheels?

A. With each notch the revolutions of the engine increases.

Q. And as a result of the increase in the revolutions in the engine, what, if anything, results regarding electric power?

A. You make more voltage.

Q. That results in more power being applied to the wheels, does it? [263] A. Yes.

Q. In starting the train from a stop, do you advance the throttle from notch to notch?

A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. Is that a gradual and successive application, or do you advance it several notches at a time?

A. Just one.

Mr. McCaffery, Jr.: Just a minute please. We will object to the question on the grounds and for the reasons it is not connected with the factual situation presented in the trial of this case; it merely seeks to elicit from the witness what a custom is, and it would tend to confuse the jury unless the custom is connected with the actual occurrence on the train during the trip upon which Mrs. Harrington was a passenger.

Court: As I understand it, the witness is just testifying as to how the Diesel locomotive operates.

Mr. Pauly: Yes, the general procedure in putting it in motion, and I do intend to connect it up by asking him if he always follows that practice, which would certainly, of necessity, apply to this particular train.

Mr. McCaffery, Jr.: With that amplification, we certainly would add the further objection of this question, which is merely a foundation question, that the testimony and the line of testimony which counsel for defendant seeks to establish by this witness on the stand merely goes to what the custom is [264] and to directing the witness' attention to what his custom is rather than to the factual situation as to what was actually done, and as such it is irrelevant and immaterial, encumbering the record, and it does not prove or tend to prove any issues in this case.

(Testimony of George Edward Tierney.)

Mr. Pauly: Your Honor, he has testified he has no personal recollection as to this particular trip. Certainly, in that event, it is proper to elicit from the witness if there is a general practice, what it is, and in addition to that, determine from him whether he has ever deviated from that practice in making any start. I grant if it should develop he has deviated, then the testimony should be stricken, but if it should appear there is a practice that he has never deviated from at any time, it should apply to this particular case.

Court: If he doesn't recall the trip at all, how can he recall or know whether he has deviated from the practice?

Mr. Pauly: If he can recall he has never deviated and knows he has not, it seems to me it would be admissible.

Court: The Court will consider the matter.

(Whereupon, a recess was taken until 1:30 o'clock, p.m., the same day, October 21, 1949, at which time, the jury and counsel for both parties being present, the following proceedings were had:)

Court: The objection is overruled. You may proceed along that line and establish the testimony with reference to his operation of the train, his customary operation of the train. [265]

(Testimony of George Edward Tierney.)

Q. (By Mr. Pauly): Mr. Tierney, do you recall the question, or do you want it repeated?

A. I would like to have it repeated.

(Question and answer read back by reporter as follows: "Question: Is that a gradual and successive application, or do you advance it several notches at a time? Answer: Just one.")

Q. Have you ever advanced the throttle to full position in one movement? A. No, sir.

Mr. McCaffery, Jr.: Just a minute. We will ask the answer be stricken.

Court: It may be stricken.

Mr. McCaffery, Jr.: We will object to this as calling for conjecture of the witness; it doesn't prove or tend to prove any issues in this case; it is not related to the incident which the jury is called upon to determine; it is an invasion of the province of the jury; it precludes human error.

Court: Overruled.

Q. Do you recall the question?

A. I answered it; yes. I said no. You asked me if I ever advanced it wide open, didn't you?

Q. In one movement, yes. A. I said no.

Q. Have you ever advanced the throttle in making a start more than one notch at a time? [266]

A. No, sir.

Mr. McCaffery, Jr.: May our objection go to this evidence in its entirety as already made?

Court: It may be so understood.

(Testimony of George Edward Tierney.)

Q. Mr. Tierney, tell us if you will, please, whether or not a Diesel locomotive of the kind you operated on that day, and whether that locomotive particularly, is equipped with a governor of any kind? A. Yes, sir.

Q. Will you tell us what the purpose of the governor is?

A. The governor controls the speed of the engine, that is, in this way: It stops it from going too fast if anything should happen and if I should—I have never tried it, but I know that is what happens if you advance it like you say, it would retard the engine from going to full speed.

Q. In other words, if I understand you correctly, if a person were to attempt to open the throttle in one single motion without going through each successive notch, would the governor operate to intervene and regulate the speed of acceleration?

A. It would hold it down, yes, sir.

Q. Or rate of acceleration? A. Yes, sir.

Q. By advancing the throttle gradually from notch to notch, does that result in a gradual acceleration of the speed of the train? [267]

A. Yes, sir, it gives more power, it increases the revolutions of your engine and raises your voltage, and, naturally, you put more power to the traction.

Q. How long do you hold the throttle in each notch before moving it to the next?

A. Until you hear the speed of your engine will

(Testimony of George Edward Tierney.)

quit rising, you see what I mean, then you give it another one.

Q. I understand that is your consistent practice in the operation of this locomotive, is that true?

A. Yes, sir.

Q. And was your pratice in August, 1947?

A. It has always been.

Mr. Pauly: During the recess, your Honor, counsel for the plaintiff and we have referred to various railroad records here available, and I think that having done so, we may now attempt to shorten this matter, both with this witness, and with others, by stipulation.

Court: Very well.

Mr. Pauly: I should like to state—and counsel, I wish you would pay attention and see if this is a correct statement—that it is stipulated between the parties that on August 26, 1947, the train involved in this lawsuit, Train No. 16, in proceeding from Seattle to Othello, the entire first division on the railroad, the train operated strictly in accordance with the established schedule which applied to that train at that [268] time, and that includes all intervening points, including Renton; that, confining it as much as possible to the section which likely is involved in this action, and between Seattle and Clue Elum, located approximately 90 miles from Seattle, and approximately two and a half hours on the time schedule, the maximum speed schedule permitted for this train varied from 30 to

(Testimony of George Edward Tierney.)

a maximum, at any point in that distance, of 55 miles an hour, and that the running time of this train, No. 16, as compared with the running time of the Olympian train, Nos. 17 and 18, which operate as a local train, excluding the stops made in between, and simply considering the actual running time, that the schedules for the two are approximately the same. Is that agreeable?.

Mr. McCaffery, Jr.: The stipulation is agreed to, based upon the records submitted and prepared by the defendant company as their official records, and having been prepared and used in their business of railroading. We were not at any time raising an issue as to speed, but the defendant believed that the stipulation was necessary in connection with some testimony of the conductor, Mr. Nolan, so, so far as the stipulation is concerned, it is agreeable.

Court: Very well.

Mr. Pauly: That is all. [269]

Cross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Tierney, how long did you practice on this Diesel engine?

A. How long did I practice?

Q. Yes.

A. You mean how long did I run it?

Q. How long did you practice on it before you ran it? A. I didn't practice on it.

Q. I was adopting your use of the term that it

(Testimony of George Edward Tierney.)

was your practice in doing these certain things. You meant it was your custom and you had done that on all previous occasions. You weren't practicing on this engine at all?

A. No, sir.

Q. You said you took your first run on the new streamliner the second night out, which would make it the 30th of June, would it not?

A. Yes, sir, as I recall it, I went out the second night, the second afternoon.

Q. I am not trying to confuse you on the day you went, but I was just trying to recall what you did testify to on direct examination, Mr. Tierney.

A. I am pretty positive it was the second day.

Q. How many trips do you make a week?

A. Ten trips a month. [270]

Q. Ten trips a month. So, from the 30th of June, 1947, to the 26th day of August, 1947, you would have made approximately 26 trips—no, you would have made approximately 16 trips?

A. On this particular train?

Q. Yes. A. That is all the train run.

Q. That is correct, Mr. Tierney?

A. On this particular train, yes.

Q. This was a new train, was it not, Mr. Tierney?

A. Yes.

Q. Would you describe, Mr. Tierney, the effect which an application of your brakes to bring the train to a stop in a station would have if the train signal to proceed shortly after the train had arrived at the station were given by the conductor?

(Testimony of George Edward Tierney.)

Mr. Garlington: Objected to as improper cross-examination, as assuming facts which are not only not in evidence, but, as we understand it, not in issue in the case.

Mr. McCaffery, Jr.: They have gone into the mechanical operations of the train. We would like to understand the physical operation in the setting and releasing of brakes and starting the train in connection with advancing the throttle, as they have gone into.

Court: Overruled.

A. Just what is the question?

Q. Maybe I can state it a little plainer by creating a situation, [271] as we think it existed. You had a scheduled stop at Renton, did you not?

A. Yes, sir.

Q. You had to apply your brakes coming to the station at Renton? A. Yes, sir.

Q. You arrived at the station at Renton at a full stop? A. Yes, sir.

Q. If there were no passengers to be discharged at Renton, according to the testimony of the conductor, but passengers were taken on; now, if you got an immediate signal from the conductor, would your brakes have released by that time?

A. Immediately after stopping?

Q. Yes.

A. It takes the brakes about 10 seconds to release.

Q. If the brakes had not fully released, Mr.

(Testimony of George Edward Tierney.)

Tierney, would it be necessary for you to advance that throttle beyond one position?

Mr. Garlington: May our objection go to this line of examination in order that it may be not repeated?

Court: It may be so understood.

A. Well, I answer that, if the brakes hadn't fully released, you would advance to the first notch, and you would make a very easy start. If you was setting in the train, you wouldn't know it was moving. [272]

Q. In other words, that first notch would move it whether the brakes were set or not?

A. It wouldn't move with the brakes set. As they gradually released, the train would move off and you wouldn't know the train had started under those circumstances if you were on it.

Q. If, Mr. Tierney, there were a sudden or violent jerk, then, on that train, that would be unusual, wouldn't it?

A. I don't know how you could create a condition to make it.

Q. Have you ever ridden behind yourself?

A. No, sir. I would like to sometime.

Q. Then, would you tell me, sitting in the position as you are, and being the propelling force of that train, how you would determine what the pick-up of slack or any other condition which would create a jerk would be?

A. I can feel it.

Q. You can feel it? A. Yes, sir.

(Testimony of George Edward Tierney.)

Q. Tell the jury, Mr. Tierney, what you would do, not usually, but when you find a slippery track, or when you have an excessive number of cars on your train? Do you still very gently move that little regulator to number one?

Mr. Garlington: We object to that on the ground it is improper cross-examination, assuming a hypothetical state of facts which has no apparent relation to this case.

Court: He is testing the witness' knowledge of the operation [273] of the train. I will overrule the objection.

A. What I would do if the track was slippery?

Q. The point I am trying to get at, Mr. Tierney, is this: The jury, after your direct examination, has the impression that at all times and under all circumstances, you regulate that train in the same manner. In other words, you take that little handle and you move it to one, and everything goes according to appointment. Now, tell them what you do if you run into slippery track, water on the track. Would you still move it to one and leave it there?

A. Put sand on the rail.

Q. All right. Would you advance it pretty fast to two? A. No, sir.

Q. You would wait for the engine to pick up?

A. No, sir, if she was slipping, she wouldn't go.

Q. Although the speed of your engine would be at a point to indicate considerable land speed, as you would call it, or mileage on your indicator, wouldn't it? A. On the number one notch?

(Testimony of George Edward Tierney.)

Q. Yes. A. No, sir.

Q. Let me state it a little differently: Would it advance your indicator indicating how fast your engine was turning over?

A. Not on number one. [274]

Q. Not on number one?

A. You just kick the power to the traction motor.

Q. In other words, that is your starting position?

A. Yes, sir.

Q. An advance to two can be made immediately, can't it? A. Yes, sir, it can.

Q. And an advance to three can be made immediately? A. In turn.

Q. Yes, in turn, but it doesn't take only a moment's hesitation at the figure or at the position on the regulator?

A. Before I can move it?

Q. Before you can move it to three?

A. I can move it up if I want to. You wait for your engine speed, you can hear it.

Q. That is the point I am trying to arrive at, Mr. Tierney. In other words, it should be done in the best practice in operating the engine, is that correct?

A. It can be done, you say?

Q. I said it should be done in the best operation of the locomotive to wait momentarily for the power of your engine to pick up? A. Yes, sir.

Q. What happens if you don't wait?

A. If you go out too fast, the governor takes

(Testimony of George Edward Tierney.)

care of it, it is supposed to. I have been told it would; that is what they [275] are there for.

Q. That is another mechanical device?

A. Yes, sir.

Q. Would there be any jerking of the train if that were to happen? A. No, sir.

Q. In other words, this train is jerk-proof?

A. Yes, sir, pretty near.

Q. Now, if you had a different number of cars on your engine at different times, it would change the normal practice, wouldn't it?

A. I don't see in what way.

Q. Well, if you have more weight or less weight behind your engine, it would regulate your speed and ability to pick up, wouldn't it?

A. Your grade comes into consideration.

Q. Yes, and the condition of the track comes into consideration, does it not?

A. Grade mostly.

Q. You have no concern with the condition of the track at any time? A. Certainly.

Q. In other words, traction, under your statement, I can't see would make any difference.

A. There is not enough traction placed on there in the first [276] or second notch to cause any slipping.

Q. To cause any slipping? A. No, sir.

Q. So, if the track were slippery, you would regulate it according to the traction which was developed by your driving wheels, wouldn't you?

(Testimony of George Edward Tierney.)

A. If the track was slippery, I would advance more carefully than if I had a good track.

Q. We have heard considerable testimony, Mr. Tierney, respecting what appeared on your memorandum that was turned into your employers. Also, for that purpose, you have heard it stipulated that the train was on time at Renton and at Cle Elum, and arrived on time, according to your recollection, at Othello? A. Yes, sir.

Q. You have also indicated that that train ticker would give us the best information concerning all of those factors, except time, haven't you?

A. Yes, sir.

Q. Now, do you have in your possession, or do you know who has, the train ticker?

A. No, sir.

Q. That train ticker would show the speed at which the train departed from Renton on that particular day, would it not?

A. It would be starting from a stop. [277]

Q. Yes.

A. It wouldn't be of any use to you that I could see.

Q. Would you let me be the judge of that. Do you know who has it in his possession, Mr. Tierney?

A. No, sir.

Q. Now, that is mechanically operated, is it not, Mr. Tierney? A. Yes, sir.

Q. How is it removed from the train?

A. How is it removed from the train?

(Testimony of George Edward Tierney.)

Q. The train ticker, yes.

A. It is under lock and key. The roundhouse force removes it.

Q. That is at the end of the trip?

A. I don't know whether they let them run out or remove them every trip or not. I think every trip on these long trips.

Mr. McCaffery, Jr.: That is all, Mr. Tierney.

Mr. Pauly: That is all, Mr. Tierney.

(Witness excused.)

ROY P. JORGENSEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pauly:

Q. State your name, please.

A. Roy P. Jorgensen. [278]

Q. Where do you live? A. Missoula.

Q. Are you employed by the Milwaukee Railroad? A. Yes, sir.

Q. In what capacity? A. Claim agent.

Q. Where is your headquarters in that respect?

A. At Missoula.

Q. As claim agent, did you assist in assembling witnesses and evidence that might be used in connection with the trial of this case? A. Yes, sir.

Q. Did you, at our request, endeavor to obtain

(Testimony of Roy P. Jorgensen.)

this speed tape for the locomotive used in pulling Train 16 out of Seattle on August 16, 1947?

A. Yes, sir.

Q. What action did you take in endeavoring to obtain that tape?

A. I wired to the general superintendent of motive power at Milwaukee, Wisconsin, who is custodian of those tapes, as I understand it.

Q. Can you tell us what wire you may have sent?

A. I wired Mr. A. G. Hoppe, Milwaukee, "Can you send me at Butte speed tape, Diesel Engine No. 6 on Train 16, leaving Seattle August 26, 1947, marked to show Seattle, Renton, Maple [279] Valley, Cedar Falls and Cle Elum, for use at trial, Federal Court at Butte, commencing Wednesday, October 19th. Advise me at Butte. A 174 R. P. Jorgensen, District Adjuster."

Q. Did you receive a reply to that telegram?

A. I did.

Q. Did I ask you when you sent that telegram?

A. On October 17, 1949, from Missoula.

Q. Did you receive a reply to that telegram?

A. Yes, sir.

Q. I show you a slip of paper marked "Defendant's Exhibit No. 4, and ask you if that is the reply that you received to the telegram you sent?

A. It is.

Court: Are you now offering Defendant's Exhibit 4?

Mr. Pauly: Yes, your Honor.

(Testimony of Roy P. Jorgensen.)

Court: Any objections, Mr. McCaffery?

Mr. McCaffery, Jr.: To which the plaintiff objects on the grounds and for the reasons that it is a self-serving declaration, the custom adopted by the railroad is again in evidence. The reply would not bind the plaintiff or any person, party to the action. They were aware of a possible claim. That is all.

Court: The objection is overruled.

Mr. Pauly: It is received in evidence?

Court: It is received in evidence. [280]

DEFENDANT'S EXHIBIT 4

"GS19CG Z
MILW WIS 10 18 49 1225 PM

R P Jorgensen
Butte

A-174 We Hold Speed Tapes for One Year Tape You Have Requested Has Been Destroyed H-6

A G H.

Filed Oct. 25-1949.

H. H. WALKER,
Clerk.

By D. F. HOLLAND,
Deputy.

(Testimony of Roy P. Jorgensen.)

Mr. Pauly: May I read it to the jury now?

(Mr. Pauly reads Exhibit 4, as above set out, to the jury.)

Q. Mr. Jorgensen, can you explain to me what some of those numbers on there might mean?

A. These numbers up at the top, I can't explain. That is some symbol used by the telegraph operator at Milwaukee to the operator at Butte. That is just a guess on my part.

Q. "Milwaukee, Wisconsin, 10 18 49", what is that?

A. It means the message was filed in Milwaukee, Wisconsin, October 18, 1949.

Q. And "1225 P.M."?

A. It means 12:25 P.M. that afternoon.

Q. The message starts with the number "A-174". What does that mean?

A. That is a symbol we used on the railroad to simplify our telegraph service. On the wire I sent to Mr. Hoppe, I put a symbol A-174 on it. [281]

Court: Counsel, I don't think there is any necessity of going into this.

Mr. Pauly: I simply wanted to explain these hieroglyphics to the jury. That is all, as far as we are concerned, with the witness.

Cross-Examination

By Mr. McCaffery, Jr.:

Q. Mr. Jorgensen, when did you first know that the plaintiff, Mary Ann Harrington, had a claim in this case?

(Testimony of Roy P. Jorgensen.)

Mr. Garlington: Just a minute; objected to as improper cross-examination.

Court: Overruled.

A. I would say June 1, 1948.

Q. June 1, 1948, that would still have been within the year, wouldn't it, Mr. Jorgensen?

A. That's right.

Mr. McCaffery, Jr.: That is all.

(Witness excused.)

Court: Call the next witness.

Mr. Pauly: At this time, your Honor, we would like to offer in evidence depositions of certain witnesses that are contained in the Clerk's file. In that connection, I should like to request that the Court inform the jury as to, in general, [282] the use of such depositions on written interrogatories so that they will know something about how it happens they are presented in that form.

Court: Well, the Court is not concerned with any depositions until you lay the foundation for the offer of the depositions.

Mr. Pauly: It is by stipulation, your Honor. May the record show that the deposition of Mrs. Ruth Burroughs and the deposition of Wendy Burroughs, both of which have been marked "filed October 21, 1949," were at this time removed by the clerk from an envelope, which in turn was marked "filed October 17, 1949?"

Court: Well, what does the stipulation with

reference to the depositions provide, just that they may be used?

Mr. Pauly: They are all substantially the same form, your Honor.

Court: The deposition may be used and offered in evidence at the trial of said cause by either of said parties thereto and applied in conformity with the Rules——(interrupted)

Mr. Pauly: The stipulation says pursuant to Rule 29 of the Federal Rules of Civil Procedure.

Court: What does Rule 29 provide?

Mr. Garlington: I have it here.

Court: It provides that if the parties so stipulate in writing, depositions may be taken before any person at any time [283] or place, upon any notice, and in any manner, and when so taken may be used like other depositions. The Court is still bound by the rules that you have to lay a proper foundation for the use of a deposition. The Rules of Procedure set up the method by which we try cases, and I don't think counsel can stipulate.

Mr. Pauly: Do you mean by that, your Honor, to prove the absence of the witnesses from the jurisdiction of this Court?

Court: Whatever basis you feel you have for the use of the depositions.

Mr. Pauly: I believe counsel for the plaintiff will stipulate each of the witnesses involved are outside of the State of Montana, District of Montana.

Mr. McCaffery, Jr.: That is correct.

Mr. Pauly: It is for that reason their deposi-

tions are offered, and they did not wish to attend in person, and we have no means for them to attend in person.

Court: Was a subpoena issued for them?

Mr. Pauly: No, your Honor, they are not in this jurisdiction.

Court: Does counsel make any objection to the use of the depositions?

Mr. McCaffery, Jr.: No, if the Court please.

Court: Very well, you may proceed upon that basis.

Mr. Pauly: I take it the Court does not care to make any further statement to the jury regarding use of the depositions [284] in the absence of the witnessess themselves.

Court: Yes. Ladies and gentlemen of the jury, the Rules of Procedure in the Federal Court provide that under certain circumstances, the testimony of witnesses may be taken upon oral interrogatories at a place some place out of Court, both sides being represented at the time of the oral interrogatories. That was so in this instance?

Mr. McCaffery, Jr.: It was not, if the Court please.

Court: The oral interrogatories were submitted before an officer authorized to swear the witness—in other words, the witness was sworn and answered certain questions that counsel had agreed should be submitted to the witness. In answer to those questions, the witness made answer. The answer is then transcribed and forwarded to the Court, just

as you saw here, in sealed envelopes, and is opened here. Now, counsel have agreed here that the deposition may be used and considered by you as evidence just as if the testimony that is contained in the deposition was given here orally in court. Is that what you had in mind, Mr. Pauly?

Mr. Pauly: Yes, your Honor, and that the witness, in answering questions, is put upon oath.

Court: Yes. You understand the witness is put on oath just as if the witness were here present in court.

Mr. Pauly: May I have someone act as the witness? I suggest Mr. Garlington, who might read the answers as I read the [285] questions.

Mr. McCaffery, Jr.: I want to have both of them sworn.

Court: In reading the answers, give Mr. McCaffery an opportunity to make whatever objections he may have.

Mr. Garlington: Certainly.

Mr. Pauly: Does the Court deem it proper to read the stipulation?

Court: That may be dispensed with.

(Whereupon, the Deposition of Mrs. H. A. Burroughs was read to the jury as follows, Mr. Pauly reading the questions and Mr. Garlington reading the answers.)

Mr. Pauly: I have here the deposition of Mrs. Ruth Burroughs, of Evanston, Illinois. (Reading.)

DEPOSITION OF MRS. RUTH BURROUGHS

Direct Interrogatories

Q. State your name, address and family status.

A. Mrs. H. A. Burroughs, 1914 Sheridan Road, Evanston, Illinois. Housewife, married to Mr. H. A. Burroughs.

Q. On August 26, 1947, were you a passenger on Milwaukee Train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. Seattle. Destination Chicago. I occupied the section directly across from Mrs. Harrington. I don't remember the section number. I was traveling with my two daughters, Wendy [286] and Connie, aged 5 and eight.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. I believe she got on at Seattle. She was traveling with her daughter. She occupied the section directly across from myself and my two daughters.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

(Deposition of Mrs. Ruth Burroughs.)

A. She sat there in her seat, and she remained there for some time, she didn't move. She appeared to be very feeble. She just sat there. She didn't do anything particularly.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Mrs. Harrington's companion was very concerned about her mother throughout the whole time before the fall. She left her seat many times. She was not with her mother very much. She would go off for a time and then she would return and she would inquire as to her mother's condition, how she felt, and repeatedly cautioned her mother not to move from her seat, and she would go off again in the club car. My daughters and I were [287] having a coke and observed her in the club car. She was not sitting with her mother very much.

Q. Describe the activities, if any, of yourself and your children during this period.

A. I was sitting on the west side, going forward, facing forward, and I was reading, and my daughters were sitting opposite me playing games and observing the passengers on the train and looking out the window, and possibly they went down the aisle for a drink of water.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. Mrs. Harrintgon stood up, despite the fact that her daughter had cautioned her repeatedly not to. I saw her stand up and try to hang her hat

(Deposition of Mrs. Ruth Burroughs.)

up there, and the hook was quite high up and she sort of braced her knee on the seat and then she toppled over and landed in the aisle.

Q. Describe what action, if any, you took after her fall.

A. I stopped reading, and almost immediately a man passenger on the car and the porter arrived, and then the conductor came there very soon. The conductor asked if there was anyone with this woman. And I told him that she was traveling with her daughter. As he didn't know who the daughter was, I suggested that I would go and find her. I found her in the observation car, and I told her that her mother had fallen. Then she went back to our car and then I went back to my seat. [288]

Q. Describe what was done after the fall, for Mrs. Harrington and by whom?

A. The porter asked her if she was hurt, and she said, "No", that she was all right. The conductor also asked her whether she was hurt and she said "No", she was all right. They were very kind to her and assisted her. And they tried to make her comfortable in her seat. She said she was all right, so there wasn't very much to do for her, except to see that she was comfortable.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. It was moving all the time.

Q. State how long after the train had left Seattle that the fall occurred.

(Deposition of Mrs. Ruth Burroughs.)

A. I am not sure, but I think it was around three hours after its departure from Seattle.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. It was a very normal motion, no unusual jerks of any kind. Just a very normal motion.

Q. Where were your children during the period covered by your answers to the foregoing questions, and what were they doing?

A. Well, they were in our section, they were riding backwards in our section, which was directly across from Mrs. Harrington's section, and they were playing games, looking out the windows and observing the passengers in the car.

Mr. Pauly: The remainder of the deposition consists of cross interrogatories asked by counsel for the plaintiff, Mr. McCaffery, would you care to read your cross interrogatories, or should I?

Mr. McCaffery, Jr.: Go ahead, Harry, you are doing fine.

Mr. Pauly: The jury will understand these questions are submitted by counsel for the plaintiff.

Cross Interrogatories

Q. Did you previously make a statement to a claim agent or investigator for the railroad company? A. Yes, I did.

Q. If your answer to the previous question is yes, state when and to whom.

(Deposition of Mrs. Ruth Burroughs.)

A. The first day of December, 1947, to a Mr. Zicherick.

Mr. Garlington: Your Honor, may I suggest there is no need for the reporter to take the depositions. He may copy them.

Court: Yes, I think he should take them.

Q. Did one of the servants of the railroad company take your name at the time of the accident?

A. Yes, the conductor did.

Q. Were you riding in the same car with the person who has been identified as Mrs. Mary Harrington? A. Yes. [290]

Q. Where were you seated when Mrs. Mary Harrington first came into Car A-16? (You may assume that this is the correct car number in which Mrs. Harrington was riding.)

A. I don't recall.

Q. Were you and your children occupying Section 12 of this car at the time Mrs. Mary Harrington and her daughter boarded the train?

A. I don't recall the section number, but I was in the section directly opposite Mrs. Harrington.

Q. If your answer to the previous question is yes, what reservations did you have in Car A-16?

A. We originally had a reservation for a section on that train, but when we arrived on the train it was occupied by a man and lady, and we were given this section until the following morning at six o'clock.

(Deposition of Mrs. Ruth Burroughs.)

Q. What was your husband's occupation on the 26th day of August, 1947?

A. He was assistant vice-president of the Automatic Electric Company of Chicago.

Q. Do you recall whether the floors between the seats in your car were covered with a rug material or linoleum material?

A. It was a linoleum material.

Q. Did you, at any time, observe the porter or conductor assisting Mrs. Mary Harrington before her fall? A. I don't recall. [291]

Q. Did Mrs. Mary Harrington, in your presence, and after she had fallen, give any explanation or state any reason for her fall? If Mrs. Harrington made a statement, what was it?

A. She made no statement as to why she fell.

Q. If Mrs. Harrington made some statement, can you recall the persons present when the statement was made?

A. She told the porter and the conductor that she was all right, that she wasn't hurt.

Q. Were you seated directly across the aisle from Mrs. Mary Harrington? And if so, were you occupying the east or west seat as the train left Seattle?

A. Yes. I was occupying the west side, riding forward, in a forward position.

Mr. Pauly: That is the end of the deposition of Mrs. Ruth Burroughs. We will now read the Deposition of Wendy Burroughs, Evanston, Illinois:

DEPOSITION OF WENDY BURROUGHS

Direct Interrogatories

Q. State your name, address, age, grade in school, where you live and with whom.

A. Wendy Burroughs. 1914 Sheridan Road, Evanston, Illinois. Eleven years old. I live with my mother and father and sister.

Q. On August 26, 1947, were you a passenger on Milwaukee Train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what [292] space you occupied, and with whom you were traveling.

A. In Seattle to come to Chicago. I don't know the number of the section, but I was in the section directly opposite where Mrs. Harrington fell, in the section with my mother and sister.

Q. Do you recall an elderly lady being on the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. I don't know where she got on. I guess she was traveling with her daughter. She occupied the space that was directly opposite the space we were occupying.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

(Deposition of Wendy Burroughs.)

A. She was just sitting there, she was reading a book, I guess.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Well, she was just running back and forth, she would come into the car and see how her mother was and then she would leave again.

Q. Describe what you were doing during this period.

A. Oh, I was just playing games there with my sister, looking [293] out the window. I was just sitting in the seat with my sister playing games.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. Well, she got up and she reached up with her hands to put her hat up there and then she fell and she landed in the main aisle. I think she put her knee on the seat when she reached up.

Q. Describe what action, if any, you took after her fall. A. I wasn't allowed to leave my seat.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Well, I don't know, but I saw the porter put her on the seat, and I know there was another man there. I think he had been sitting back of us, but I don't know. I don't know if this man touched her. Later on the conductor came in. I guess the porter went and got the conductor, but I don't know that for sure.

(Deposition of Wendy Burroughs.)

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. It was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I don't know, but I know it was before dinner.

Q. Describe the motion, if any, of the train just prior to [294] and at the time of Mrs. Harrington's fall.

A. It didn't jerk or anything, it traveled along smoothly.

Mr. Pauly: The following questions, now, are cross interrogatories submitted by counsel for the plaintiff:

Cross Interrogatories

Q. Did you see Mrs. Mary Harrington fall?

A. Yes.

Q. What was she doing, or about to do, when she fell? A. Trying to hang her hat up.

Q. Did the train jerk about the time Mrs. Harrington fell? A. No.

Q. Did you talk to anybody about Mrs. Harrington's fall before? A. Yes.

Q. Did the person to whom you talked represent the railroad company, if you know?

A. I think so.

Q. Did you and your mother occupy the seat of Mrs. Harrington and her daughter when Mrs. Harrington first got on the train? A. No.

(Deposition of Wendy Burroughs.)

Q. Did you have to move across the aisle to your seat? A. No.

Q. Who helped you move?

A. We didn't move across the aisle.

Q. Had the train left Seattle when you moved?

A. No, sir. [295]

Mr. Pauly: That is all of that deposition. The following is a Deposition of Mrs. A. J. Stratton:

DEPOSITION OF MRS. A. J. STRATTON

Direct Interrogatories

Q. State your name, address and family status.

A. Mrs. A. J. Stratton, Stony Creek Mills, Pennsylvania, housewife.

Q. On August 26, 1947, were you a passenger on Milwaukee train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. We got on at Seattle. Our destination was Chicago; section 14. I was traveling with my husband, Mr. A. J. Stratton.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was travelling, and what space on the car they occupied.

(Deposition of Mrs. A. J. Stratton.)

A. I do not recall where she got on. She was traveling with a younger woman. They occupied the space immediately to the rear, and on the same side of the car.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I did not observe her except to notice that she was there. [296]

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. I was aware of the companion leaving the section several times and being absent much of the time.

Q. Describe what you were doing during this period.

A. I was sitting facing the rear of the coach and occasionally looking out the window.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. I was seated on the aisle side of the seat and saw Mrs. Harrington in the act of falling. She was in the center aisle of the car facing toward me and extended her hands out to break her fall and landed in a kneeling position with her left hand on the arm-rest of the seat immediately in back of Mr. Stratton and her right hand, as I recall, on the arm-rest on the seat across the aisle from where her left hand was. I do not recall on which knee she landed.

(Deposition of Mrs. A. J. Stratton.)

She cried out, "Oh! Oh!" She remained in a kneeling position.

Q. Describe what action, if any, you took after her fall.

A. I went to her assistance, but she would not allow me to help her.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Other passengers and the porter and conductor went to her assistance. Someone went for her daughter. [297]

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I am not positive as to the time.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. It seemed to me it was smooth at the time. It didn't have any lumps and bumps.

Mr. Pauly: The following are cross interrogatories submitted by plaintiff's counsel:

Cross Interrogatories

Q. What Section did you have in Car A-16?

A. Section 14.

Q. Did you see Mrs. Mary Harrington fall?

A. Yes.

Q. From what place in the car was your observation made of her fall?

(Deposition of Mrs. A. J. Stratton.)

A. From my seat on the aisle in Section 14.

Q. Did you assist Mrs. Harrington after her fall? A. I tried to.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was [298] the statement she made, and give the identity of the persons present to the best of your ability. A. No answer.

Q. Can you describe the floor-covering between the seats? A. No, I can't.

Q. Was it of rug or linoleum composition?

A. I don't remember.

Q. Have you previously made a statement to one of the railroad's representatives?

A. I did.

Q. If your answer to the previous question is yes, to whom was it made and when?

A. To Mr. Ring on July 20, 1949.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied at the time Mrs. Harrington and her daughter boarded the train?

A. I don't know. I didn't hear anything.

Q. If your answer to the previous question is yes, when, with references to the train's departure from Seattle, did Mrs. Harrington first occupy the space in Section 12? (You may assume Section 12 is the Section in which Mrs. Harrington fell.)

(Deposition of Mrs. A. J. Stratton.)

A. I don't know when Mrs. Harrington first occupied the space in Section 12. [299]

Mr. Pauly: That is the end of Mrs. Stratton's deposition.

DEPOSITION OF A. J. STRATTON

Direct Interrogatories

Q. State your name, address and occupation.

A. A. J. Stratton, Stony Creek Mills, Pennsylvania, President, Reading Street Railway Company.

Q. On August 26, 1947, were you a passenger on Milwaukee train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. Boarded the train at Seattle, destination Chicago, accompanied by Mrs. Stratton.

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. I did not notice Mrs. Harrington as to the point at which she boarded the train except having casually observed her as a passenger, occupying the space immediately behind the space occupied by Mrs. Stratton and myself. She was accompanied

(Deposition of A. J. Stratton.)

by a younger person said to have been her daughter. The space occupied by Mrs. Stratton and myself was section 14 at the [300] forward end of the car. I sat facing forward and Mrs. Stratton sat facing me. This was the left side of the train as referred to the direction in which the train was moving.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I paid no particular attention to the lady or her activities.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Mrs. Harrington's companion did not seem to be very much in evidence.

Q. Describe what you were doing during this period.

A. Looking out of the window and generally enjoying the scenery.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. I did not observe Mrs. Harrington fall.

Q. Describe what action, if any, you took after her fall.

A. Inasmuch as several ladies went to Mrs. Harrington's assistance, I personally did not take any part in the matter.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Lady passengers assisted Mrs. Harrington

(Deposition of A. J. Stratton.)

to regain her seat. The porter was summoned and eventually the pullman and train conductors. Also, I believe someone summoned Mrs. [301] Harrington's daughter from another part of the train.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving at a normal and probably scheduled rate of speed. In my judgment the speed was not excessive.

Q. State how long after the train had left Seattle that the fall occurred.

A. I cannot be very definite about the question. My recollection is about two hours.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. The car in which we were riding was relatively new, and in my judgment swaying and other conditions contributing to passenger discomfort had been largely eliminated. I think the train ride was exceptionally smooth considering the terrain over which it traveled. There was no undue lurching of the car, that I recall, prior to her fall.

Mr. Pauly: That is the end of the direct questions.

Cross Interrogatories

Q. What Section did you have in Car A-16?

A. Section 14.

Q. Did you see Mrs. Mary Harrington fall?

A. No.

(Deposition of A. J. Stratton.)

Q. From what place in the car was your observation of her fall made? [302]

A. I did not see her fall.

Q. Did you assist Mrs. Harrington after her fall? A. No.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was the statement she made, and give the identity of the persons present to the best of your ability. A. No answer.

Q. Can you describe the floor-covering between the seats? A. No.

Q. Was it of rug or linoleum composition?

A. I do not know.

Q. Have you previously made a statement to one of the railroad's representatives? A. No.

Q. If your answer to the previous question is yes, to whom was it made and when?

A. No answer.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied at the time Mrs. Harrington and her daughter boarded the train?

A. To the best of my knowledge there was no difficulty concerning [303] her space.

Q. If your answer to the previous question is yes, when, with references to the Train's departure

(Deposition of A. J. Stratton.)
from Seattle, did Mrs. Harrington first occupy the space in Section 12? (You may assume Section 12 is the Section in which Mrs. Harrington fell.)

A. I do not remember when.

Mr. Pauly: That is all of Mr. Stratton's deposition.

Court: We will interrupt at this point, I have another matter to consider for a moment.

(15-minutes recess.)

Mr. Pauly: The next deposition to be read is that of Mr. J. B. Abney of Albertville, Alabama:

DEPOSITION OF MR. J. B. ABNEY

Direct Interrogatories

Q. State your name, address and occupation.

A. J. B. Abney, my address is South Broad Street, Albertville, Alabama; my occupation, Truck Driver for Commercial Carriers.

Q. On August 26, 1947, were you a passenger on Milwaukee Train No. 16 when it departed from Seattle? A. Yes.

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling.

A. I got on the train in Seattle, Washington. I was going to Albertville, Alabama by way of Chicago, Illinois. I was sitting next to the aisle, facing in direction which train was [304] going on left hand side of aisle at rear of car. I was travelling with my wife.

(Deposition of J. B. Abney.)

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes, I do.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. She got on train in Seattle, with a woman whom I believe to be her daughter; they sat on same side of train as we did at the opposite end of the car. Mrs. Harrington was seated facing me.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I first saw her when she got on the train as she walked down the aisle to her seat. I didn't particularly pay any attention to her until later.

Q. Describe the activities, if any, of Mrs. Harrington's companion during this period.

A. Mrs. Harrington's companion talked to several of the passengers on the train, then she left the car long periods of time. She returned after Mrs. Harrington fell.

Q. Describe what you were doing during this period.

A. I remained in my seat, watching the scenery and activities [305] of passengers on the train.

Q. Describe in as much detail as possible what you observed of Mrs. Harrington's fall.

A. She was upon her seat on her knees, with her

(Deposition of J. B. Abney.)

back toward me. She was reaching up to hang something on the hook above her. I said to my wife at that time,——

Mr. McCaffery, Jr.: Just a minute. We will object to any statement which this witness made to his wife on the grounds and for the reason it is hearsay, it is hearsay as far as this plaintiff is concerned; incompetent, irrevelant and immaterial.

Mr. Garlington: Have you seen the answer?

Court: Look at the answer. The objection will be sustained. Technically, what he said to his wife is hearsay as to this plaintiff, so do not read that part of the deposition stating what he said to his wife.

A. (Continued): She was holding to the back of her seat with her left hand. I looked away for an instant and when I looked again she was making an effort to sit down. While she was still in a kneeling position on the seat, she turned slightly to her right to sit down on her seat, then she fell towards me against the seat in front of her seat, the seat in which she had been sitting. By that I mean she was kneeeling on the seat when she fell facing somewhat towards the aisle and fell back onto the seat opposite from where she had been seated. [306] After falling against this seat, she fell into the aisle. When she fell, there was a hat on the hook to which she had been reaching towards and at the time she fell she had already released her hold on the back of the seat. She had knelt on the seat next to the arm rest on the aisle side of the seat.

(Deposition of J. B. Abney.)

Q. Describe what action, if any, you took after her fall.

A. Others went to her assistance, so I remained in my seat.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Passengers went to her assistance. The porter and conductor were called, and they first put her back on her seat, then they made up her berth and put her to bed. Someone went back and got her daughter from another car. A Doctor got on the train at Spokane and attended her.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I don't recall.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. The train was travelling at a very smoothly rate. There were no jerks, at any time, for when she fell she fell straight back, rather than to the right or left. [307]

Mr. Pauly: That is the end of the direct interrogatories.

Cross-Interrogatories:

Q. What section did you have in Car A-16?

A. I don't remember.

Q. Did you see Mrs. Mary Harrington fall?

(Deposition of J. B. Abney.)

A. I did see her fall.

Q. From what place in the car was your observation made of her fall?

A. From my seat facing toward her at the rear of the car where I was seated next to the aisle.

Q. Did you assist Mrs. Harrington after her fall? A. No.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was the statement she made, and give the identity of the persons present to the best of your ability.

A. I did not hear her make any statement.

Q. Can you describe the floor-covering between the seats? A. No.

Q. Was it of rug or linoleum composition?

A. I don't recall.

Q. Have you previously made a statement to one of the railroad's representatives? [308]

A. Yes.

Q. If your answer to the previous question is yes, to whom was it made and when?

A. I talked to some man from Chattanooga, Tennessee, who said he represented some railroad, but I do not recall his name.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied

(Deposition of J. B. Abney.)

at the time Mrs. Harrington and her daughter boarded the train?

A. I did not notice any difficulty. I do not know whether or not the space was occupied.

Q. If your answer to the previous question is yes, when, with reference to the train's departure from Seattle, did Mrs. Harrington first occupy the space in Section 12? (You may assume Section 12 is the Section in which Mrs. Harrington fell.)

A. She sat down before the train left Seattle.

Mr. Pauly: That is the end of Mr. Abney's deposition. The following is a deposition of Mrs. J. B. Abney:

DEPOSITION OF MRS. J. B. ABNEY

Direct Interrogatories

Q. State your name, address and family status.

A. My name is Alice Abney, my address is South Broad Street, Albertville, I am married to Mr. J. B. Abney.

Q. On August 26, 1947, were you a passenger on Milwaukee train No. 16 when it departed from Seattle? A. Yes. [309]

Q. State where you got on the train, your destination, what space you occupied, and with whom you were traveling?

A. I got on the train in Seattle, I was going to Albertville, Alabama, by way of Chicago, Ill. I was traveling with my husband. I was at the rear end of the car next to the window on the left

(Deposition of Mrs. J. B. Abney.)

hand side of the car, in same seat with husband

Q. Do you recall an elderly lady being in the same car and suffering a fall? A. Yes.

Q. State what you know about when and where the elderly lady, who is identified for purposes of this deposition as Mrs. Mary Harrington, first got on the train, with whom she was traveling, and what space on the car they occupied.

A. She first got on train in Seattle, she was traveling with a person whom I believed to be her daughter. They were ahead of us at the opposite end of the car on the left side, the same as us.

Q. Describe the activities, if any, of Mrs. Harrington from the time you first observed her until the time of her fall.

A. I just noticed her walking to her seat at the time she got on at Seattle and didn't pay much attention to her until Mr. Abney, my husband, called my attention to her.

Q. Describe what you were doing during this period. A. Looking at the scenery.

Q. Describe in as much detail as possible what you observed of [310] Mrs. Harrington's fall.

A. My husband called my attention to her and I leaned to my right to watch her and saw her kneeling on the seat near aisle with her back toward me reaching up with one of her hands and with the other was trying to hold wall in front of her. I then looked away and did not see her fall.

Q. Describe what action, if any, you took after her fall.

(Deposition of Mrs. J. B. Abney.)

A. I did nothing at all, but remained in my seat. Others were looking after her.

Q. Describe what was done after the fall for Mrs. Harrington, and by whom.

A. Others looked after her, I do not recall who they were.

Q. State whether the train was standing or moving just prior to Mrs. Harrington's fall.

A. The train was moving.

Q. State how long after the train had left Seattle that the fall occurred.

A. I don't recall.

Q. Describe the motion, if any, of the train just prior to and at the time of Mrs. Harrington's fall.

A. The train was moving along normally, nothing out of the way occurred, there were no jerks. It was a smooth ride.

Mr. Pauly: The following are cross-interrogatories by counsel for the plaintiff:

Cross-Interrogatories

Q. What Section did you have in Car A-16?

A. I don't remember.

Q. Did you see Mrs. Mary Harrington fall?

A. I did not.

Q. From what place in the car was your observation made of her fall?

A. I didn't see her fall, but I did see her when my husband called my attention to her and I leaned over to the right.

(Deposition of Mrs. J. B. Abney.)

Q. Did you assist Mrs. Harrington after her fall? A. No.

Q. Were you present when Mrs. Harrington made any statement as to the cause of her fall?

A. No.

Q. If your answer to the previous question is yes, what was the statement she made, and give the identity of the persons present to the best of your ability.

A. I did not hear her make a statement.

Q. Can you describe the floor covering between the seats? A. No.

Q. Was it of rug or linoleum composition?

A. I don't recall.

Q. Have you previously made a statement to one of the railroad's representatives?

A. I talked to some man from Chattanooga, Tennessee.

Q. If your answer to the previous question is yes, to whom was it made and when? [312]

A. I do not know who he was, that is he told us his name but I don't remember it.

Q. Did Mrs. Harrington and her daughter have any difficulty in occupying the space in which she later fell? In other words, was the space occupied at the time Mrs. Harrington and her daughter boarded the train?

A. I didn't notice any difficulty.

Q. If your answer to the previous question is yes, when, with reference to the train's departure

(Deposition of Mrs. J. B. Abney.)

from Seattle, did Mrs. Harrington first occupy the space in Section 12? You may assume Section 12 is the section in which Mrs. Harrington fell.

A. I suppose she was seated before the train left Seattle.

Mr. Pauly: That is the end of Mrs. Abney's deposition. I should merely like to say, your Honor, that in addition to the witnesses that have been called, it was our intention to call Dr. Shields, who, at our request, made a physical examination of the plaintiff on August 20th of this year. In that connection, however, on arrival here in Butte for the purpose of attending this trial, we learned that Dr. Shields had already left the city to attend a conference of American Surgeons in Chicago. He is now absent, not expected to return until next week. I do not intend to ask for any continuance for the sake of permitting him to attend and testify. We did make it known to Dr. Shields that the setting was expected about this time; however, we did not advise him of the definite date. To that extent we are probably remiss. I wish to make that explanation to explain his absence at this trial. With that explanation, the defendant rests.

The Court: Do you have any rebuttal?

Mr. McCaffery, Jr.: There is no rebuttal, if the Court please.

The Court: Well, if counsel will approach the bench here, we may have a conference as to what further proceedings we are going to take at this time.

(Whereupon, the jury was admonished and excused from further attendance upon the court until 10:00 o'clock a.m., Monday, October 24, 1949, and the following proceedings were had in the absence of the jury:)

The Court: There are no jurors left in the courtroom, are there? Very well, proceed.

Mr. Garlington: May an order be made dismissing witnesses who have already testified in the case?

The Court: Yes, all witnesses who have been subpoenaed here are now excused permanently.

Mr. Garlington: At the close of all the testimony in the case, the defendant now desires to move the Court for an order, pursuant to Rule 50, Subdivision B of the Rules of Procedure, directing a verdict in this case in favor of the defendant and against the plaintiff, the motion being made upon each of the following grounds: first, that the complaint, as amended, does not state facts sufficient to constitute [314] a claim for relief against the defendant; second, there is no evidence in the record that the defendant has violated any legal duty owed to the plaintiff in this case; third, that there is not sufficient in the record to establish any of the alleged acts of negligence charged against the defendant by the plaintiff in the complaint, as amended; fourth, that there is not sufficient evidence in the record that any act of negligence on the part of the defendant was the proximate cause of any injury sustained by the plaintiff; fifth, that

the evidence shows that the plaintiff in the case was guilty of contributory negligence as a matter of law; sixth, that there is not sufficient evidence in the record to support or sustain any verdict or judgment in this case in favor of the plaintiff and against the defendant. That is the motion which I desire to make.

The Court: Very well, the motion is denied.

Mr. McCaffery, Jr.: At this time, if the Court please, the plaintiff desires to move the Court to withdraw from the consideration of the jury the issue of contributory negligence as alleged by the defendant's pleading, as amended, on the grounds and for the reasons that, first, no substantial evidence has been introduced in support of the allegation of contributory negligence whereby any act of the plaintiff contributed to the proximate cause of her injuries; secondly, that the evidence adduced at the trial and upon the defendant's [315] case was wholly directed to an activity of the plaintiff within the section for which she had contracted and which she had a right to engage in; third, that to submit the issue of contributory negligence to the jury in the language adopted by the amendment would be prejudicial error for the reason that the amendment seeks by indirection to include the defense of assumption of risk, and, if permitted to stand as such, would be a defense which is not permitted in actions of this nature prosecuted by a passenger against a carrier; that the language to which this objection is directed in the amend-

ment is as follows: "that if said floor rendered the footing insecure for the plaintiff while standing thereon during travel, she knew and realized the same, or by the exercise of reasonable care, should have done so, and should not have incurred the risk, if there was a risk, of standing and moving about on such floor without assistance"; fourth, that the defense, as asserted, places upon the plaintiff a duty of care not required by law to be exercised by a plaintiff in a case against a carrier wherein the law, by all authorities, is that she may assume that the highest degree of care has been exercised in providing her with safe transportation and appliances and other things, which have been dictated by the reasonable exercise of skill on the part of the railroad company for her safe passage; that until such assumption has been dissipated by the showing of a patent defect, no care need be exercised [316] by the passenger in a section with her travel.

The Court: What is the law of the State of Washington with reference to contributory negligence? Does contributory negligence assume negligence by the defendant?

Mr. Myers: It is my understanding, your Honor, that a plea of contributory negligence in Washington may be made without admitting negligence on the part of the defendant, and that the question——(interrupted)

The Court: It may be made without admitting it, yes, but in the final analysis, and in submit-

ting it to a jury, what is the position the Court is in then? Don't you have to instruct the jury that contributory negligence is based upon negligence in the first place by the defendant?

Mr. Myers: Such negligence as, cooperating with the negligence of the defendant, produces the injury.

The Court: I think that the pleading of contributory negligence here is sufficient, particularly under the Federal Rules, and it need not be submitted —if contributory negligence is set up, the mere fact that it is set forth in words which do not conform to the law—that is the question—wouldn't make it insufficient so far as submitting the question to the jury. In other words, if contributory negligence is proved and there is some evidence of it, it can be submitted to the jury, not in the characteristics made by the pleading, but under the instructions of the Court. However, I am going to reserve my ruling on your motion at this time, and we will discuss the matter in connection with our settling and conference on the instructions generally. Court will stand in recess at this time until ten o'clock tomorrow morning, or, rather, Monday morning.

(Whereupon, court was adjourned until 10:00 o'clock a.m., October 24, 1949, at which time the following proceedings were had, the jury and counsel for both parties being present:)

(Mr. Myers made the opening argument to the jury on behalf of the plaintiff; Mr. Pauly

argued the case to the jury on behalf of the defendant; and Mr. McCaffery, Jr., closed the argument to the jury on behalf of plaintiff.)

(Whereupon, a recess was taken until 2:00 o'clock p.m., same day, at which time the following proceedings were had:)

The Court: In the case of Harrington vs. Chicago, Milwaukee, St. Paul Railroad, for the record, it may show that the Court is giving all of the instructions requested by the defendant here, either as submitted or as amended and counsel advised of the amendments, except Instruction D-4, which was withdrawn, D-7, which was withdrawn, D-12, which is included within the instructions the Court will give, D-14, which is included within the instruction the Court will give; and the Court refuses to give Defendant's Instruction No. D-16.

As to the plaintiff's instructions, the Court has given and will give all of the instructions submitted, either just as [318] submitted, or as amended by the Court and counsel advised, with the exception of Instruction No. 1, which is included within the instructions of the Court, Instruction No. 2, which is included, Instruction No. 3, which is included, and No. 4, which is included within the instructions to be given by the Court, Instruction No. 9, withdrawn, Instruction 11, Plaintiff's Instruction 11 is included within the instructions of the Court, as is number 13. The Court refuses to give

Instruction No. 14, and Instruction No. 10 is included within the instructions of the Court.

Jury Charge

The Court: Well, now, ladies and gentlemen of the jury, we have come to that part of the proceedings which you have been advised of before where the Court instructs you as to the law of the case. You have heard the evidence and arguments of counsel, and it is now my duty to instruct you as to the law governing this case, and it is your duty as jurors to follow the law as stated in these instructions of the Court, and to apply that law to the facts as you find them from the evidence before you.

You are not to single out any one instruction alone as stating the law of this case, but must consider the instructions as a whole, and, regardless of any opinion that you may have as to what the law ought to be, it will be a violation of your duty, your sworn duty, to base a verdict upon any other view [319] of the law than that given to you by these instructions.

You have been chosen and sworn as jurors in this case to try issues as presented by the allegations of the complaint of the plaintiff and the answer of the defendant, and you are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion; and the parties and the public and the Court expect

that you will carefully and impartially consider all of the evidence and follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community. The corporation is entitled to the same fair trial at your hands as a private individual. The law is no respector of persons. In other words, all persons, including corporations, which are legal entities, stand equal before the law.

You are instructed that because this case is submitted to you for decision it is no indication or evidence that there is or is not liability upon the defendant, nor is it any indication that, in the opinion of the Court, there is or is not liability. It is for you to determine from the evidence and the law as given you by the instructions whether or not there is liability, and you must determine this question first, and if you find that the plaintiff has not established a case of liability by a preponderance of the evidence, you shall not consider [320] any other question in the case, but shall find for the defendant.

Plaintiff, in this case, claims damages for personal injuries alleged to have been suffered by her as a proximate result of claimed negligence on the part of the defendant. You are instructed that the plaintiff need not prove the allegations of the complaint which are admitted by the answer. Any

allegation of the complaint which is so admitted in the answer is to be taken by you and regarded as true.

You are instructed that every person who suffers detriment from the unlawful act or omission of another may recover from the person at fault a compensation therefor in money, which is called damages. Detriment is the loss or harm suffered in person, in this case.

Now, in considering the case, you are further instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant was negligent in failing to notify the plaintiff through its public address system on the train that the train was about to start, and, therefore, that issue is withdrawn from your consideration.

Likewise, there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant's employees were negligent and careless in failing to assist the plaintiff to make a change [321] to her permanent seat in the train, and, likewise, that issue is withdrawn from your consideration.

There is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of whether defendant negligently furnished to the plaintiff inadequate and unsafe facilities for the accommodation of her hat and coat by reason of the size and location of the

hook in the section, as alleged in the complaint, and, therefore, that issue, likewise is withdrawn from your consideration.

There isn't sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of duplicating the sale of plaintiff's seat space, by which the plaintiff was unable to locate herself permanently in her seat before changing her place in her section, and, therefore, that issue is likewise withdrawn from your consideration.

You are further instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surfaced composition floor material in its Touralux coaches, and, so, the issue of deciding whether the plaintiff could recover is withdrawn from your consideration based upon the mere furnishing of a hard-surfaced composition floor material; and, likewise, you are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk. Therefore, that issue is withdrawn from your consideration, so you will not consider those two elements separately in considering the case, but you will consider them together as you will be further instructed by the Court.

Now, in order to establish the essential elements

of her case, the burden is upon the plaintiff to prove by a preponderance of the evidence the following facts: First, that the defendant was negligent, as herein defined; and second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff. In other words, the plaintiff's theory of the facts is that the defendant started the train with a violent and unusual jerk, and that defendant provided an insecure footing upon which to stand, and that as a result of such concurring acts, the plaintiff was thrown to the floor of the car and sustained the injuries of which she complains.

Now, the defendant denies any negligence and denies the train started with a violent or unusual jerk, and denies it provided an insecure footing. Defendant takes the further position that the plaintiff herself was negligent in placing herself in a dangerous position by kneeling on the seat, and that negligence contributed substantially to cause her injuries. Those are the simple, plain issues of the case. [323]

You are instructed that the defendant, as a common carrier, owed to the plaintiff, as its passenger, the duty to exercise the highest degree of care for her safety, consistent with the practical operation of the railroad train, and in this connection, the defendant must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

You are further instructed that, even though the

highest degree of care is required of the defendant in the case, the mere fact that injury has been sustained does not, of itself, apart from the circumstances under which the injury occurred, create a presumption that it was occasioned through the negligence of the defendant.

Now, actionable negligence is an unintentional breach of a legal duty causing injury reasonably foreseeable, without which breach the injury would not have occurred. The actual result of an act or omission is not controlling in determining whether or not there was negligence, nor is the duty of the person to do or omit an act to be estimated by what, after an injury has occurred, then first appears to be a proper precaution, but the question of negligence must be determined according to what should reasonably have been anticipated, in the exercise of the highest degree of care, as likely to happen.

The defendant, in the exercise of the highest degree of [324] care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age.

You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual, and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling

as a passenger in Section 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant.

You are instructed that the law recognizes that, to a certain extent, jerking, jolting, lurching and swaying of railroad trains is unavoidable in the practical operation of a train, and is reasonably incident to its ordinary and careful operation. Therefore, the plaintiff must show by a preponderance of the evidence that such jerk or jolt, if such did occur, was unusual, extraordinary, unnecessary, and the result of the careless and negligent operation of the train by the defendant.

You are instructed that the defendant in this case is [325] required by law to exercise the highest degree of care, prudence and foresight for the safety of its passengers compatible with the practical performance of its duty of transportation, and if you find from a preponderance of the evidence that the defendant has failed to exercise such care and has been guilty of the slightest negligence in this respect, then your verdict must be for the plaintiff and against the defendant.

In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant alleges as an affirmative defense that contributory negligence on the

part of the plaintiff was the proximate cause of any injury which the plaintiff may have sustained. Contributory negligence is negligence on the part of a person injured which, cooperating with the negligence of the defendant, helps substantially in proximately causing the injury. The burden is on the defendant alleging the affirmative defense of contributory negligence to prove by a preponderance of the evidence in the case that the plaintiff was negligent, and that such negligence was a proximate cause of any injury which the plaintiff may have sustained. One who is guilty of contributory negligence may not recover from another for an injury suffered.

Now, negligence is the doing of some act which a reasonably prudent person would not do, or failure to do something which a reasonably prudent person would do, actuated by those causes which ordinarily regulate the conduct of human affairs. It is failure to use ordinary care under the circumstances in the management of one's person, in this case.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves.

The burden is upon the plaintiff to prove by a preponderance of all the evidence, first, that the defendant was negligent in the particulars defined in these instructions, and second, that such negligence was the proximate cause of her injury. If the plaintiff has not fulfilled this burden, the de-

fendant is entitled to a verdict, and you need not consider the issue of contributory negligence. If, however, the plaintiff has fulfilled this bruden, then she is entitled to recover from the defendant unless the defense of contributory negligence has been established under the Court's instructions. To establish this defense, the burden is on the defendant to prove by a preponderance of the evidence that the plaintiff was negligent in the particular defined in these instructions, and that such negligence contributed in a substantial degree as a proximate cause of her injuries. If this burden has been fulfilled, then your verdict should be for the defendant.

If you should find for the plaintiff on both issues of negligence and contributory negligence as submitted to you by these instructions, it is then in order for you to consider the matter of damages. While the burden rests upon the party who [327] asserts the affirmative of an issue to prove its allegations by a preponderance of the evidence, this rule does not require demonstration or such degree of proof as produces absolute certainty, because such proof, as you all can well understand, rarely is possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side and if it causes the jurors to believe that the

probability or truth of such issue favors that party.

By a preponderance of the evidence is meant the greater weight. The preponderance of evidence in the case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying and interest or lack of interest, if any, in the result of the case, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence. In other words, such evidence as when weighed with that opposed to it has [328] more convincing force and produces in your minds conviction of the greater probability of truth.

A party or person asserting a claim or defense, if it is controverted, is required to establish it by the preponderance of the evidence given on that particular issue. If the evidence given on that particular issue is evenly balanced, then the claim or defense is not proven; but the Court instructs you in that connection that, as a matter of law, where two witnesses testify directly opposite to each other on a material point and are the only ones that testify directly to the same point, you are not

bound to consider the evidence evenly balanced. The mere fact that one person testifies on one side and one on the other side does not mean that the evidence is necessarily evenly balanced or the point not proved. You may regard all surrounding facts and circumstances proved on the trial and give credence to one witness over the other if you think such facts and circumstances warrant it.

Now, proximate cause of an injury is that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish an injury. You are, therefore, instructed that if you find from the evidence that the negligence, if any, of the defendant was the proximate cause of the injuries, if any, sustained by [329] the plaintiff, your verdict must be in favor of the plaintiff. This does not mean that the law seeks and recognizes only one proximate cause, injuries consisting of only one factor, one act, one element or circumstance. To the contrary, two or more acts, omissions, elements or circumstances may work concurrently as the efficient cause of injuries.

You are instructed that if, under the evidence and all the instructions of the Court, you believe from a preponderance of the evidence that the plaintiff was guilty of negligence in that the plaintiff was negligent and careless in putting herself in a position of danger from falling or getting her-

self off balance as a result of normal train movements which she, in the exercise of reasonable care, should have anticipated, knowing her own physical limitations, and that such negligence, if any, contributed in any substantial degree to the causing of her injuries, then your verdict should be for the defendant, even though you may further find from the evidence the instructions of the Court that the defendant itself was also negligent in some one or more of the particulars as claimed by the plaintiff. All other allegations of contributory negligence in this case are withdrawn from your consideration. In other words, the only question of contributory negligence that you are to consider in the case is that which might result, if you so find, from the plaintiff herself putting herself in a position of danger from falling or getting herself off balance as a [330] result of normal train movements.

Now, since a corporation can act only through its officers, agents, or employees, the burden is upon the plaintiff to prove by a preponderance of the evidence that the negligence of one or more of the officers, agents, or employees of the defendant was the proximate cause of any injury and consequent damages sustained by the plaintiff, and any negligent act or omission of an officer, agent or employee, in the performance of his duties, is held at law to be the negligence of the employer, the defendant in this case.

Now, you, as jurors, are the sole judges of the credibility of witnesses and the weight their testi-

mony deserves. A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, and demeanor and manner while on the stand. Consider also any relationship each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. [331]

Inconsistencies or discrepancies in the testimony of witnesses or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error, or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness just such credibility, if any, as you may think it deserves.

Your power of judging of the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

As I say, you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The test is not the number of witnesses, but which witnesses appeal to your minds and which evidence appeals to your minds as being more accurate and otherwise trustworthy.

A witness false in one part of his testimony is to be distrusted in others.

Evidence is to be estimated not only by its own intrinsic [332] weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

A witness may be discredited or impeached by contradictory evidence. If you believe any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified

falsely concerning any material matter, you have the right to distrust such testimony of that witness, and you may distrust all the evidence of that witness, or give it such credibility as you think it deserves.

Statements and arguments of counsel are not evidence in the case, unless made as admissions or stipulations of fact. When an admission or stipulation of fact is made, the jury must accept the admission or stipulation and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any [333] evidence as to which objection has been sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded. You are to consider only the evidence in the case, but in your consideration of the evidence, you are not limited to the bald statements of witnesses. On the contrary, you are permitted to draw from the facts which you find to have been proven such inferences as seem justified in the light of common experience.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by proving another fact which, even though true, does not

itself establish the fact in controversy, but which affords an inference of such fact.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds. The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witnesses and which evidence appears to your minds as being most accurate and trustworthy. [334]

The testimony of a single witness which produces conviction in your minds is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of one witness.

Plaintiff alleges that by reason of her claimed injuries, proximately resulting from the accident involved in this case, she has sustained general damages in the sum of $50,000, and has lost the additional sum of $5,081.40 on account of hospital, drug, nursing and doctor attention and care. These allegations are not evidence, of course, but merely the extent of the plaintiff's claims, and must not be

considered by you as evidence. You are instructed that if, under all the evidence and the instructions of the Court, you shall have occasion to consider the question of damages, the amount asked by plaintiff in her complaint is no criterion or measure of the amount of damages which you should award to the plaintiff, other than you may in no event allow anything in excess thereof. To your sound discretion and judgment is confided, in the first place, the question of what compensation will be adequate for the plaintiff, in the event you find plaintiff is entitled to any compensation. You are not permitted in law to allow anything fanciful in the way of damages, but are limited to such sum as, [335] in your judgment, represents reasonable, adequate compensation for such detriment as, under the evidence, you may believe plaintiff has sustained as a proximate result of the acts of which plaintiff has claimed as against defendant, and which you may believe plaintiff has established by a preponderance of the evidence.

In cases seeking damages for personal injury, it is the duty of the Court to instruct the jury upon the rule of the measure of damages, but the jury are not to understand that because of such instructions they are to give damages simply by reason of the fact that instructions have been given to them on that subject. Instructions as to damages are given only to be applied in case plaintiff is justly entitled to a verdict on the evidence. They have no application where, upon the consideration of the

whole case, the liability of the defendant has not been established, nor should they be understood by the jury as conveying any intimation that the Court feels plaintiff is or is not entitled to damages. You are instructed that the amount demanded by the plaintiff in her complaint is not to be taken by you as a criterion of the damages, if any, sustained by her in the event you should find for her.

You are instructed that if you find your verdict in favor of the plaintiff and against the defendant, then, in fixing the amount of damages to be awarded to the plaintiff, you may take into consideration the permanency of her injuries, if any, [336] and her mental and physical pain and suffering caused by the injuries, if any. You may also award her as damages the reasonable value of her hospital, medical, doctor and nursing care, if any, which have been incurred by the plaintiff by reason of such injuries, but in no event can your verdict exceed the sum of $50,000 general damages or the sum of $5,081.40, special damages.

Now, the law of the United States permits the judge to comment to the jury on the evidence in the case. In this particular case, as I view it, ladies and gentlemen of the jury, I think that the issues of fact are clear enough so that it isn't necessary for the Court to comment upon the evidence in an effort to assist you. The facts have been presented here and are not complicated. Both sides have argued the case from their point of view, not unreasonably from either side, and so the matter is

for your decision as the judges of the facts of the case. I think it requires no assistance from the Court.

During the course of the trial, I occasionally have asked questions of a witness. I do that in order to bring out facts not then fully covered in the testimony, but do not assume that I hold any opinion on the matters to which my questions relate. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your findings as to the facts. The Court takes no position with reference to facts, merely submits those facts to you, and you as jurors determine [337] them.

It has also been the duty of the Court to admonish an attorney, who, out of zeal for his cause, may have stepped beyond the bounds of proper procedure at the time. You are particularly instructed you are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case. Counsel on both sides have merely, each for his own side, has merely presented here to the best of their ability their theory of the case for your consideration, and the Court had not in mind, and did not intend, and you are not to draw any inference as to the Court's opinion in any matter concerning which he addressed counsel.

Now, your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto.

Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, don't hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but don't surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning [338] a verdict. The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror upon entering the jury room to announce an emphatic opinion on the case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved and the juror may later hesitate to recede from an announced position, even when it is shown to be incorrect. You are not partisans, you are judges, the judges of the facts in this case. Your sole interest here is to ascertain the truth, and you will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note to me by the bailiff. You are not to reveal to me or to any person how the jury stands numerically

or otherwise until you have reached an unanimous verdict.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in Court.

Ladies and gentlemen of the jury, at this point, it is necessary for you to leave the court room in order to permit other legal problems to be presented to the Court as a result of the Court's instructions, so you are admonished by the Court not to discuss with each other or anyone else, nor suffer yourselves [339] to be addressed by anyone concerning the subject of this trial, nor are you to form or express any opinion thereon until the case is finally submitted to you. You will withdraw from the courtroom, but remain together in the hall so that you may be called.

(Jury retires from the Courtroom.)

Court: Any objections to the instructions of the Court on the part of the plaintiff?

Mr. McCaffery, Jr.: At this time, the plaintiff objects and excepts to the Court's instructions and the withdrawal of the issue of negligence as contained in Defendant's Instruction No. 6, Defendant's Instruction No. 17, 18, 19 and 20, on the theory that all of the specified acts went to make up a continuous sequence of events, each of which was concurrent and contributed eventually to the plaintiff's injuries; that the Court should have sub-

mitted the question of the sequence of events to the jury with the admonition as to proximate cause for the verdict of the jury upon such a theory of negligence; that to withdraw such a theory after substantial proof of all of the events was prejudicial error as against the plaintiff. Further, that the plaintiff takes exception to the withdrawal by the Court of each individual and specified act of negligence as contained in the Defendant's Instructions 6, 17, 18, 19 and 20, as indicated.

The plaintiff has made her exceptions to the failure of the [340] Court, or the giving by the Court of the instructions of the defendant as numbered, and takes exception to the refusal of the Court to give plaintiff's Instruction No. 14, as offered. Plaintiff has no objection to the giving by the Court, as modified by the Court Plaintiff's Instruction 9. That is all.

Court: The objections are overruled.

Mr. McCaffery, Jr.: Exception.

Mr. Garlington: Before I state the defendant's exceptions, I would like to inquire if the rewritten instruction setting forth the plaintiff's theory bears any numerical designation in the record?

Court: Plaintiff's Instruction 30 I'll make it.

Mr. Garlington: At the conclusion of the Court's charge to the jury, and pursuant to Rule 51, the defendant now excepts to the Court's charge in the following respects:

The defendant excepts to the plaintiff's Instruction designated No. 30, wherein the Court submitted

to the jury the combined issue of the defendant's negligence with regards to a sudden jerk and its negligence with respect to the condition of the floor between the seats, the objection being as follows: first, that there is not sufficient evidence in the record to justify submitting to the jury for consideration the question of whether the defendant negligently and carelessly started its train with a violent, unusual and unnecessary jerk, as stated in the instruction, the evidence being that no such violent and [341] unusual and unnecessary jerk took place; second, that there is not sufficient evidence in the record to justify submitting for consideration of the jury the question of whether the defendant negligently provided an insecure footing between the seats in Car A-16 by reason of a hard-surfaced composition floor, as distinguished from a carpeted floor, and that there is nothing upon which the jury may base a finding of negligence on the part of this defendant in this respect. Next, that the submission of the plaintiff's Instruction No. 30 creates a conflict and confusion with other instructions on the issues affecting the matter of the jerk of the train and the insecure footing by virtue of the composition floor between the seat, the Court having ruled that in the individual instances and separately there is insufficient evidence to go to the jury on either of those theories; and next number, that the effect of plaintiff's Instruction No. 30 is to combine two theories, each of which is in itself insufficiently supported by evidence to establish lia-

bility, and that by so combining these theories to establish another theory of liability which would not otherwise exist, the Court is incorrectly stating the law applicable to the case. It is the defendant's contention in this respect that the effect of Instruction No. 30 is analogous to attempting to add zero plus zero to obtain one, in that (interrupted).

Court: You needn't make an argument, Mr. Garlington.

Mr. Garlington: I understand. I am trying to make my [342] point clear in the record.

Court: Proceed.

Mr. Garlington: The defendant further excepts to the Court's charge with respect to the instruction on contributory negligence in that the Court has limited and restricted the issue of contributory negligence to the act of the plaintiff in getting herself in a position of danger from falling or getting off balance, and has eliminated from the consideration of the jury the remaining allegations of contributory negligence set forth in the defendant's further defense as offered, it being the position of the defendant that there was competent evidence of other acts and elements of contributory negligence on the part of the plaintiff which should be submitted to the jury for consideration.

Court: Very well, the objections are overruled. Call the jury in.

(Jury returns to the Courtroom.)

Court: Ladies and gentlemen of the jury, the

case is ready to be submitted to you. Forms of verdict have been prepared for your convenience and will be handed to you by the bailiff, and you will take them to the jury room with you, and when you have reached an unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form which sets forth the verdict upon which you agree, and then you will return with your verdict to the courtroom, sign [343] that one verdict upon which you agree, your foreman will.

It is proper to add again the caution that nothing said in these instructions, nothing in any form of verdict prepared for your convenience is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury. Swear the bailiffs.

(Bailiffs sworn.)

Court: You will now retire to the jury room with the bailiffs.

DEFENDANT'S INSTRUCTION NO. D-6, GIVEN BY THE COURT AND EXCEPTED TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant's employees were negligent and careless in failing to assist the plaintiff to make

a change in her permanent seat in the train, and therefore that issue is withdrawn from your consideration."

DEFENDANT'S INSTRUCTION NO. D-17, GIVEN BY THE COURT AND EXCEPTED TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue of whether the defendant negligently furnished to the plaintiff inadequate and unsafe facilities for [344] the accommodation of her hat and coat, by reason of the size and location of the hook in the section, as alleged in the complaint, and therefore that issue is withdrawn from your consideration."

DEFENDANT'S INSTRUCTION NO. D-18, GIVEN BY THE COURT AND EXCEPTED TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk, as alleged in the complaint, and therefore that issue is withdrawn from your consideration."

DEFENDANT'S INSTRUCTION NO. D-19, GIVEN BY THE COURT AND EXCEPTED TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue of duplicating the sale of the plaintiff's seat space by which the plaintiff was unable to locate herself permanently in her seat before changing her place in her section, and therefore that issue is withdrawn from your consideration."

DEFENDANT'S INSTRUCTION NO. D-20, GIVEN BY THE COURT AND EXCEPTED TO BY THE PLAINTIFF:

"You are instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surface composition floor material in [345] its Tourahux coaches, and therefore that issue is withdrawn from your consideration."

PLAINTIFF'S OFFERED INSTRUCTION NO. 14, REFUSED BY THE COURT AND REFUSAL EXCEPTED TO BY PLAINTIFF:

"You are instructed that in this case expert testimony has been received in evidence. You are to consider such expert testimony like any other testimony and give it such weight as in your judgment the testimony deserves, if any."

PLAINTIFF'S INSTRUCTION NO. 30, GIVEN BY THE COURT AND EXCEPTED TO BY THE DEFENDANT:

"You are instructed that the defendant, in the exercise of the highest degree of care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age;

You are further instructed that if you find from a preponderance of the evidence in this case first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk, after a scheduled stop, and second, that the defendant negligently provided insecure footing between the seats by a hard surfaced composition floor, on which the plaintiff, traveling as a passenger in Section 12, Car A-16 Touralux, was standing at the time the train was so started, and that as a natural and probable consequence [346] of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find your verdict in favor of the plaintiff and against the defendant." [347]

REPORTER'S CERTIFICATE

United States of America,
State of Montana—ss.

I, John J. Parker, do hereby certify that I am the official Court Reporter in the above entitled court; that the foregoing transcript is a full, true and correct transcript of the proceedings had and testimony taken in the cause of Mary Ann Harrington, Plaintiff, vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Defendant, being Civil Cause No. 245 in the Butte Division of said Court, tried before the Honorable W. D. Murray, United States District Judge, sitting with a jury, at Butte, Montana, on the 19th, 20th, 21st and 24th days of October, 1949.

Dated this 3rd day of December, 1949.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed December 3, 1949. [348]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes Now Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the defendant above named, and pursuant to Rule 75 (a) hereby serves and files its designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal in the above entitled cause:

1. Names and addresses of attorneys of record.

2. Plaintiff's complaint.

3. Defendant's answer.

4. Reporter's transcript of testimony, excluding opening statements of counsel to the jury.

5. Verdict.

6. Judgment.

7. Defendant's motion for judgment notwithstanding the verdict.

8. Order of the court dated November 26, 1949, denying defendant's motion for judgment.

9. Notice of appeal.

10. Order of transmission of original exhibits.

11. Designation of contents of record on appeal.

12. Statement of points upon which defendant intends to rely.

13. Certificate of Clerk of Court.

MURPHY, GARLINGTON & PAULY,

/s/ J. C. GARLINGTON,

/s/ H. C. PAULY,

611 Montana Building, Missoula, Montana, Attorneys for Defendant.

[Endorsed]: Filed December 28, 1949.

CLERK'S CERTIFICATE OF TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consists of the original papers, viz: Judgment Roll, consisting of Plaintiff's Complaint, Defendant's Answer, Verdict and Judgment; Reporter's Transcript of Testimony; Defendant's Motion for Judgment, notwithstanding the Verdict; Order of the court dated November 26, 1949, denying Defendant's Motion for Judgment; Notice of Appeal; Order of Transmission of Original Exhibits; Desigation of Contents of Record on Appeal; Statement of Points, upon which Defendant intends to rely, together with

Names and Addresses of Attorneys of Record and Certificate of Clerk of Court, the same being all matters designated by the parties and required by the rule as the record on appeal in Case No. 245, Mary Ann Harrington vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation.

I further certify that the costs of said Transcript amount to the sum of Five and No/100 Dollars ($5.00), and have been paid by the Appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 11th day of January, A. D. 1950.

H. H. WALKER,
Clerk.

[Seal] By /s/ D. F. HOLLAND,
Deputy Clerk.

[Endorsed]: No. 12451. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, Appellant, vs. Mary Ann Harrington, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed January 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12451

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

vs.

MARY ANN HARRINGTON,

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL, AND STATEMENT OF POINTS ON APPEAL

For the purpose of complying with Rule 19, of the above named Court, appellant hereby adopts its designation of contents of record on appeal, and its statement of points upon which defendant intends to rely on appeal, filed in the above entitled cause in the District Court on the 28th day of December, 1949, as appellant's statement of points on which it intends to rely on this appeal and its designation of the parts of the record necessary for the consideration thereof, as required by Section 6 of said Rule 19.

Dated This 14th day of January, 1950.

MURPHY, GARLINGTON
& PAULY.

/s/ J. C. GARLINGTON,

/s/ H. C. PAULY,

Attorneys for Appellant.

Service of the foregoing designation and statement of points by receipt of copy is acknowledged this 16 day of January, 1950.

McCAFFERY & McCAFFERY,

/s/ SOUTHMORE P. MYERS,
Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed January 23, 1950.

No. 12451

United States
Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

— vs. —

MARY ANN HARRINGTON,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Montana.

Filed ....., 1950

.....Clerk.

No. 12451

United States
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CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

— vs. —

MARY ANN HARRINGTON,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Montana.

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STATEMENT OF THE PLEADINGS AND JURISDICTION

This is a damage suit for personal injuries by a passenger against the carrier, grounded on negligence. The complaint prays damages of $53,350, and alleges diversity of citizenship. (Tr. 2, Par. I). The answer admits the diversity of citizenship, (Tr. 11), and there is no dispute as to jurisdiction of the court.

Sec. 1332, Title 28, U.S.C.A., Judiciary Code.

The case was tried in Butte, Montana, in October, 1949, resulting in a verdict for the plaintiff for $15,000, (Tr. 16). Motions by the defendant for directed verdict, (Tr. 303), and for judgment notwithstanding the verdict, (Tr. 19), having been duly made and denied, this appeal is taken by the defendant from the final judgment entered on the verdict, (Tr. 16).

Sec. 1291, Title 28, U.S.C.A., Judiciary Code.

STATEMENT OF THE CASE

The accident occurred August 26, 1947, aboard the Milwaukee's new streamliner "Olympian Hiawatha," a short distance east of Seattle, Washington.

A. *Outline of the issues—*

We think this case shifted so unusually from the theory originally pleaded to the theory finally submitted to the jury that a review of the issues may be helpful to the court.

The complaint (Par. III and IV, Tr. 3) alleges in essence that the railroad sold the plaintiff's berth space to someone else, that she was not settled in her own space prior to departure from Seattle, that defendant failed to

assist her to move though she was 75 years old and needed assistance, that while she was moving herself during a station stop the train was violently started without warning and she fell backward, suffering injury.

The acts of negligence charged against defendant are catalogued, (Tr. 6):

a. Duplicating the sale of berth space.

b. Not assisting plaintiff to change to her proper berth.

c. Not warning plaintiff by the train public address system or otherwise that the train was about to start.

d. Not providing proper facilities for plaintiff's coat and hat, by reason of these defects:

1) The hook was small and poorly placed
2) The floor between the seats was a bare slippery composition, instead of rug like the aisle.

The answer is largely a denial of these allegations, together with a plea of contributory negligence by plaintiff in not signalling for the porter or asking assistance to make her move (Tr. 11).

At the close of the plaintiff's case, counsel obtained leave of court to amend the complaint by adding a new allegation of negligence, (Tr. 154):

"e) That the Defendant in the exercise of the highest degree of care knew, or should have known that injuries were liable to be sustained by passengers, and particularly this plaintiff, because of the insecure footing provided by the Defendant in its Tour-alux Coaches in those portions thereof covered by a hard surface composition, namely that portion between the seats provided for occupancy of passengers and particularly should have anticipated injuries to passengers stand-

ing upon such hard surfaced material when the train lurched, swayed or gave an unusual, unexpected or violent jerk."

At the close of the entire case, the court withdrew from the jury's consideration all of the above issues on the ground that there was not sufficient evidence to sustain them, (Tr. 310, 311), but over the defendant's objection (Tr. 329-31) gave the following instructions, (Tr. 311-14):

"You are further instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surfaced composition floor material in its Touralux coaches, and, so, the issue of deciding whether the plaintiff could recover is withdrawn from your consideration based upon the mere furnishing of a hard-surfaced composition floor material; and, likewise, you are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk. Therefore, that issue is withdrawn from your consideration, so you will not consider those two elements separately in considering the case, but you will consider them together as you will be further instructed by the Court . . .

The defendant, in the exercise of the highest degree of care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age.

You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling as a passenger in Sec-

tion 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant.

B. *Questions on this appeal.*

1. The defendant at all stages of the case has denied negligence in any respect, and contends that the record, though viewed most favorably for the plaintiff, contains no evidence sufficient to sustain the verdict. If so, defendant's motions for directed verdict, and judgment notwithstanding the verdict, should have been granted. Therefore, the main question for review is whether the evidence sustains the verdict and judgment for the plaintiff, or whether defendant's motion for judgment should be granted.

2. The instruction No. 30, quoted above, (Tr. 313-14), submitted to the jury a twin combination theory of negligence which the defendant objected to (Tr. 329-31) as not only unsupported by evidence but also as conflicting with other instructions given, and as incorrect law. It presented to the jury a concept of negligence which permits two lawful, non-negligent acts to be combined into negligence, like adding zero plus zero and getting one. We contend that this resulted in prejudicial error necessitating a new trial on correct instructions, even if the defendant should not have summary judgment as contended under question one above.

SPECIFICATION OF ERRORS

1. The Court committed error in refusing to grant the defendant's motion for directed verdict upon one or more of the grounds specified by the defendant in said motion, (Tr. 303).

2. The Court committed error in refusing to grant defendant's motion for judgment in its favor and against the plaintiff, setting aside the verdict theretofore returned in favor of the plaintiff in said cause, (Tr. 19).

3. The Court incorrectly charged the jury as follows:

> The defendant, in the exercise of the highest degree of care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age.
>
> You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual, and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling as a passenger in Section 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant. (Tr. 313-14).

to which the defendant objected:

> The defendant excepts to the plaintiff's Instruction designated No. 30, wherein the Court submitted to the jury the combined issue of the defendant's negligence with regards to a sudden jerk and its negligence with respect to the condition of the floor between the seats, the objection being as follows: first, that there is not

sufficient evidence in the record to justify submitting to the jury for consideration the question of whether the defendant negligently and carelessly started its train with a violent, unusual and unnecessary jerk, as stated in the instruction, the evidence being that no such violent and unusual and unnecessary jerk took place; second, that there is not sufficient evidence in the record to justify submitting for consideration of the jury the question of whether the defendant negligently provided an insecure footing between the seats in Car A-16 by reason of a hard-surfaced composition floor, as distinguished from a carpeted floor, and that there is nothing upon which the jury may base a finding of negligence on the part of this defendant in this respect. Next, that the submission of the plaintiff's Instruction No. 30 creates a conflict and confusion with other instructions on the issues affecting the matter of the jerk of the train and the insecure footing by virtue of the composition floor between the seat, the Court having ruled that in the individual instances and separately there is insufficient evidence to go to the jury on either of those theories; and next number, that the effect of plaintiff's Instruction No. 30 is to combine two theories, each of which is in itself insufficiently supported by evidence to establish liability, and that by so combining these theories to establish another theory of liability which would not otherwise exist, the Court is incorrectly stating the law applicable to the case. It is the defendant's contention in this respect that the effect of Instruction No. 30 is analogous to attempting to add zero plus zero to obtain one. (Tr. 329-31).

ARGUMENT

SUMMARY OF ARGUMENT

A. *Law of the State of Washington controls.*

This being an action in personam, transitory in nature, for a tort occurring in the State of Washington, the parties hereto do not dispute the controlling effect of the law of Washington.

B. *General Duty of Carrier to Passenger.*

The Supreme Court of Washington defines the duty as follows:

> "The rule that carriers of passengers should be held to exercise the highest degree of care consistent with the practical operation of the means of conveyance used arises out of the nature of the employment and is based on the grounds of public policy."
>
> Phillips v. Hardgrave, 296 Pac. 559, 161 Wash. 121.

The jury was substantially so instructed, without objection. (Tr. 314).

C. *Was there a negligent, violent jerk of the train?*

1. *Evidence summarized.*

In conformity with Washington decisions we will later cite, the court instructed the jury, without objection, (Tr. 314):

> "You are instructed that the law recognizes that, to a certain extent, jerking, jolting, lurching and swaying of railroad trains is unavoidable in the practical operation of a train, and is reasonably incident to its ordiary and careful operation. Therefore, the plaintiff must show by a preponderance of the evidence that such jerk or jolt, if such did occur, was unusual, extraordinary, unnecessary, and the result of the careless and negligent operation of the train by the defendant."

In the light of this, let us consider the evidence. It is undisputed that the train involved was the Milwaukee's new streamliner, "Olympian Hiawatha," put into service in June of 1947, (Tr. 244), and that plaintiff's fall was in one of the new Touralux sleeping cars. The detail of the car's berth and interior appointments appears in the photographs, Original Exhibits 1 to 1-D, inclusive, (Tr. 21).

It is undisputed that high speed, faulty roadbed, sharp curves, etc., are not involved, as plaintiff's evidence is that the train was *stopped* when she rose to her feet, and then the jerk occurred, (Tr. 47).

It is undisputed that the train was powered with a new Fairbanks-Morse three-unit Diesel electric locomotive, equipped with an automatic governor, (Tr. 253, 258, 265). There were twelve cars behind the locomotive, (Tr. 231).

The engineer, a man of over forty years' experience, (Tr. 243), testified that the throttle is advanced gradually from notch to notch, resulting in gradual acceleration of the speed of the train, (Tr. 258). On cross-examination he testified he did not know how one could create a condition to make a sudden and violent jerk, (Tr. 263); that even if the throttle is advanced too fast, the governor is supposed to take care of it, and there would be no jerking, (Tr. 266). He stated the train is pretty near jerk-proof, (Tr. 266). None of this evidence is contradicted, there having been no expert or technical evidence offered by the plaintiff as to how the alleged jerk could have been caused, or that it was a result of negligence.

With this background of undisputed facts, let us examine the plaintiff's evidence as to a violent jerk. Only the plaintiff herself testified to any jerk, all other witnesses who were conscious of her fall testifying squarely to the contrary, (Mr. Abney, Tr. 296; Mrs. Abney, Tr. 300; Mrs. Burroughs, Tr. 279; Wendy Burroughs, Tr. 284; Love, Tr. 223; Nolan, Tr. 182; Mr. Stratton, Tr. 291; Mrs. Stratton, Tr. 287).

Fair quotations of the plaintiff's direct testimony are:

"Q. Mrs. Harrington, how would you describe the jerk?

A. I couldn't describe it in any other way than like it was two cars went together and my feet went out from under me on the slippery floor. There wasn't any carpet there. My head must have struck on carpet." (Tr. 47).

"Q. Can you describe in any way, Mrs. Harrington, your fall at that time?

A. Well, I can't describe it any more than my two feet went right out when the jerk came from under me. I fell flat on my back." (Tr. 48).

"Q. Did that come from a slight movement of the car, or was it a violent movement, or what was it, Mrs. Harrington?

A. It was a very violent jerk . As I said, it was just like two cars went together, like that. My feet went out from under me and I fell flat, my head striking out towards the aisle." (Tr. 89).

"Q. Have you ever experienced in your travels a jerk like the one which you experienced on this train?

A. I couldn't say that I did. I have often noticed jerks in the train, but I was never standing up on one." (Tr. 91).

On Cross-examination:

"Q. Was the train stopped or in motion, do you know, when you first started to move the hat?"

A. The train was stopped, and I picked it up and when I gave one step down to throw up the hat, the train just gave a jerk, just like that. My two feet went out from under me, and I fell down.

"Q. Is it your thought the jerk occurred as the train started or after it had gotten under way?

A. I was so knocked out, I can't remember that."

"Q. You don't know?

A. I don't know whether it was going then or not. It was just like one car bumped into another, the jerk." (Tr. 102-03).

"Q. You have referred to this as being a jerk like two cars coming together?"

A. Yes, just an awful jerk."

"Q. Am I correct in understanding that you mean by that a jerk such as if they had coupled on another car to the train?"

A. That is what I thought it must have been.

"Q. You thought they were coupling another car on to the train?

A. Yes."

"Q. You didn't mean by that you thought another train had run into the one you were riding on?

A. No, I thought they had put on another car and gave a jerk." (Tr. 106-06).

"A. I was facing the window, and the hook was right along side the window."

"Q. You were not bending over?

A. I was not bending over."

"Q. You had both feet on the floor?

A. Both feet on the ground."

"Q. Did you fall backwards?

A. Fell backwards, yes. My two feet went toward the window and my head went toward the aisle. . . ." (Tr. 107).

It seems to us that the plaintiff's case stands or falls on the above statements. Concerning them, the court told the jury, (Tr. 311):

> ". . . you are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk."

And yet, on the very same statements, the jury was permitted to find that the defendant "negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk after a scheduled stop," (Tr. 313), as one element of the twin combination theory of liability.

2. *Washington decisions considered.*

By the law of Washington, we think this evidence is wholly inadequate and insufficient. In its latest decision on a passenger case, the Court re-affirmed its view that mere adjectives are not enough to impose liability.

Nopson v. City of Seattle, 207 P. 2d 674.

Going back to earlier passenger cases, we quote:

"In order to establish liability, there must be evidence of what appeared to take place as physical facts from which it can be inferred that the operator of the vehicle was negligent, or evidence capable of conveying to the ordinary mind a definite conception of some conduct on the part of those in charge of the car, outside of that of ordinary experience, on which a finding of negligence could rest. . . .

'It is too well settled for discussion or for repetition of the reasons that mere jerks and jolts in starting an electric car, however vituperatively described, do not constitute negligence. . . .'

The circumstance that a passenger walking or standing within the car may fall, unaccompanied by some further physical facts showing violence in the operation of the car, is insufficient to establish negligence."

Wade v. North Coast Transp. Co., 5 P. 2d 986, 165 Wash. 418.

These principles are simple, and probably are not themselves in dispute here. It is their application to the evidence that produces disagreement. The most helpful and illustrative Washington decision, for this purpose, is

Keller v. City of Seattle, 94 P. 2d 184, 200 Wash. 573.

The facts involved a fall and injury to a passenger on a city street car, caused by a sudden jerk. Three witnesses described the incident, and the court was considering

whether there was sufficient evidence to go to the jury. The plaintiff's description was:

> "I got up and started toward the forward end of the car and when it gave a lurch, a very strong lurch, and threw me with great force up against the seat and the people on the right hand side of the car. . . . It was a very violent jerk. It threw me forward. . . . It threw me to my knees."

One of her witnesses testified that after the car started there was a jerk as if the brakes had been applied suddenly, swinging her forward. She said the jerk "was very forceful and violent." The third witness testified that it was the most severe jerk she had ever experienced, it threw her forward and gave her knees a sharp bump, knocked her hat to the back of her head and she hit her hat on the person in front of her.

The court quoted the following with approval:

> " 'Accepting as true plaintiff's evidence as to how the accident happened, we are required to determine whether it is sufficient to show that the car was operated in a negligent manner. In a long line of decisions, recently reviewed by us in Smith v. Pittsburgh Rys. Co., 314 Pa. 541, 171 A. 879, this court and the Superior Court have held that statements that a street car 'started violently,' ' started with a violent jerk,' 'started with a sudden, unusual, extraordinary jerk,' 'stopped with a jerk,' 'came to a hard stop,' 'started up all of a sudden, with an awful jerk, and stopped all of a sudden,' and the like, are not of themselves sufficient to show negligent operation of the car, but that *there must be evidence inherently establishing that the occurrence was of an unusual and extraordinary character, or evidence of its effect on other passengers sufficient to show this.*" (Italics supplied).

Applying the law to the evidence, the court concluded:

"We agree with the appellant that the cases sustain its contention as to the testimony given by the plaintiff herself, and by Mrs. Breen, but we do not hold that view as to the testimony given by Mrs. Belarde. It is to be remembered that the car had stopped at the intersection where jerks might be expected to occur in stopping and starting, and was proceeding on its way when this jerk or jolt happened. In our opinion, reasonable men might well believe from Mrs. Belarde's testimony that this jerk was something more than the ordinary jolt or jerk incident to transportation, especially since it occurred when the car was traveling between intersections, and that, in the absence of any explanation on the part of appellant, it laid the foundation for a logical inference that its servant did not exercise that high degree of care which the law imposes upon carriers of passengers; or to put the matter more briefly, that *there was sufficient evidence, in the words of the Endicott case, 'of its effect on other passengers' (Mrs. Belarde) to warrant such an inference.*" (Italics supplied).

However, the court declared this to be the bare minimum:

"Here, the result of the action wholly depended upon the question as to whether or not the motorman operated the car in a negligent manner. The evidence tending to prove that he did was not very convincing and, indeed, was barely sufficient to carry the case to the jury."

Therefore, the problem for this Court is to determine whether Mrs. Harrington's testimony, supplemented perhaps by her Doctor's statement that she had a severe fall (Tr. 79-80), measures up to the minimum requirement of Washington law as exemplified in the Keller case. True, she used the adjectives "sudden," "terrible," "awful" and

"very violent" in describing the jerk, but all the courts seem to agree that words alone are inadequate to characterize the event. What may have *seemed* violent to a 75 year old lady needing assistance to move from one berth to another, (Tr. 4-5, Par. IV), apparently did not impress itself on the consciousness of *any other person on the train,* as there is a total lack of corroboration of the plaintiff's testimony by other witnesses. Not only was there no showing that the jerk had an effect on other passengers, but on the contrary, six disinterested passengers, testifying by deposition, described the train movement in varying terms as smooth and normal. (Tr. 279, 284, 287, 291, 296, 300).

Nor were any physical facts shown from which negligence can be inferred. Actually, the bare fact of her fall itself not only fails to make up the deficiency, but strongly tends to make it greater. From the quotations of the plaintiff's testimony given above, the Court will note that she places herself standing squarely facing the window just before she fell, and that she fell backward toward the aisle. This can only mean that she fell at a perfect right angle to the line of force of a sudden jerk by the train in starting. Had a jerk of the train in starting forward caused plaintiff to fall, it would by the simplest law of nature have caused her to fall *in the opposite direction against the rear seat.* She would have been thrown into the cushioned berth, and certainly not at right angles to the line of force. A sideways lurch, as when a speeding train rounds a curve, could have thrown plaintiff backward into the aisle, but surely no forward jerk could have.

Now, the above is the sum total of the plaintiff's case on this point. If the Washington law is that

> "There must be evidence of what appeared to take place, as physical facts from which it can be inferred the operator was negligent, or evidence capable of conveying to the ordinary mind a definite conception of some conduct . . . outside of that of ordinary experience, on which a finding of negligence could rest," (Wade case, supra).

then we must ask what physical facts or definite concepts appear here. There is no evidence of any casualty to or breakdown in the train facilities, major or minor. There is no evidence of excessive speed or reckless operation to create unusual train movements. There is no evidence of any passenger, except plaintiff, who felt any jerk, jar or unusual motion of any kind. There is no evidence that a car was coupled into the train, befitting plaintiff's description of the jerk. There is no evidence to furnish even a possible explanation of how that new train and locomotive could have produced a sudden and violent jerk, to contradict the testimony of the engineer. The only physical fact in the plaintiff's case is that she fell in totally the wrong direction for a sudden forward jerk of the train to have caused her fall. Therefore, plaintiff's case must stand alone on her unsupported adjectives, and the decision in the Keller case above cited clearly declares this to be insufficient.

Even the plaintiff's adjectives are not so harsh, when examined in context with her factual comparison of the jerk as being like cars coupling together. Certainly it cannot be said that such a jerk or jar is unusual, as in train opera-

tion cars must from time to time be switched, coupled and uncoupled. That is a normal incident of travel, such as the court recognized when he instructed the jury, (Tr. 314),

> "... the law recognizes that to a certain extent jerking, jolting, lurching and swaying of railroad trains is unavoidable in the practical operation of a train, and is reasonably incident to its ordinary and careful operation."

Plaintiff tacitly admitted this, for when asked the $64 question as to whether she had ever experienced a jerk like this she answered, (Tr. 91),

> "I couldn't say that I did. I have often noticed jerks in the train, *but I was never standing up on one.*" (Italics supplied).

This means in effect that she feels she cannot compare the jerk in question with previous ones because of a difference in her position (sitting or standing) when she felt them. Her answer was undoubtedly her best effort to make a comparison, but she found that it had to be so qualified as to become substantially meaningless. In any event, her statement certainly does not prove that the jerk alleged was so

> "unusual, extraordinary, unnecessary and the result of the careless and negligent operation of the train," (Tr. 314),

as to meet the requirement of the Court's instructions.

We think the description of her fall given by Mrs. Burroughs and her daughter, (Tr. 276, 282), passenger eye witnesses seated just across the aisle, is the true explanation of what happened. At the age of 78, and with her infirmity, the surprise and shock of a sudden fall following

her effort to reach the coat hook could well have left the plaintiff with the impressions she described. But whatever the situation may have been, we earnestly contend that the evidence falls short of the minimum requirement, viewed in the most favorable light for the plaintiff. Therefore, the verdict is contrary to the evidence.

D. *Was there negligence in not carpeting the floor between the seats?*

1. *Evidence summarized.*

The court instructed the jury, (Tr. 311):

> "there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surfaced composition floor material in its Touralux coaches."

But the court on this point also instructed that if, (Tr. 313):

> "the defendant negligently provided insecure footing between the seats by a hard-surface composition floor"

and also negligently jerked the train, as a result of which *combination* the plaintiff was injured, she should recover.

This phase of the case presents a unique and interesting problem. In defining it, we must note some eliminations which will narrow it materially. There is no allegation or proof that the composition floor was defectively installed, or was out of repair, or had any foreign substance on it, or was excessively waxed and slippery. The whole question is whether it was negligence, *per se,* for the Touralux cars not to have carpet between the seats, instead of a bare, hard-surfaced composition floor. The whole attack is on

the planning and design of the Touralux car, and the jury was permitted to decide that the design was negligent and faulty on what we consider to be no evidence whatsoever thereof.

The sum total of the plaintiff's testimony concerning the floor is:

"Q. Did your feet slip in any way, Mrs. Harrington?

A. Just with the jerk, they went straight out from under me and I went flat." (Tr. 45).

"Q. Mrs. Harrington, how would you describe the jerk?

A. I couldn't describe it in any other way than like it was two cars went together and my feet went out from under me on the slippery floor. There wasn't any carpet there. My head must have struck on carpet." (Tr. 47).

Her daughter testified:

"A. Then I looked at the floor. I saw the floor was, I would say, an asphalt tiling, and I noticed down the aisle was carpeting.

"Q. What was the condition of the asphalt tile as to whether or not it was polished?

A. I could see it was a slippery floor. Whether or not additional, extra polish had been added, I could not state."

"Q. Was there a shine to the surface?

A. There was a shine, yes." (Tr. 124-26)

For the plaintiff, conductor Nolan testified that he believed carpeting is used throughout First Class sections of the train, (Tr. 32), that there is a composition floor between the seats in the Touralux cars and carpet on the center aisle, (Tr. 29), that the same composition floor is at the

aisleways in either end of the car, and in part of the smoking room ,(Tr. 36-7), and all through the day coaches, (Tr. 39).

Then the plaintiff proposed to offer expert testimony from an architect as to the comparative footing provided by a rug and asphalt tile, (Tr. 149). The Court finally excluded it on the ground that the subject is not one for expert testimony, (Tr. 152), although the defendant objected to it on other grounds as well, (Tr. 149).

There is not a word in the record to identify accurately the composition of this floor. There is nothing to show whether it is a type of material commonly used in public passageways or not. There is nothing to show that any other passenger in the train found the footing hazardous or insecure between the Touralux seats. There is nothing to show that in either railroad or all human experience such a floor has ever previously caused such an injury, or that by highest degree of care the railroad might have foreseen a hazard of injury like this. There is nothing to show that plaintiff's injury would not have occurred no matter what kind of floor material she was standing on. There is absolutely nothing but speculation and conjecture upon which to base a verdict that the difference between a carpet and this composition floor would have made the difference between no injury and plaintiff's injury. If it is common knowledge that a carpet is surer footing than a hard-surfaced composition floor, (which is a doubtful conclusion in some instances anyway) it is also common knowledge that very few public conveyances have carpeted floors.

The plaintiff has the burden of proving negligence as alleged. Aside from the simple statement that the floor was a bare composition on which her feet slipped when the jerk was felt, there is nothing to sustain the burden except the jury's "common knowledge" as to the relative merits of flooring materials. Surely the law has not sagged to the point where juries on their own knowledge can declare various portions of planned and designed railroad equipment to be negligently faulty. Then there would be as many standards of care (in effect) as there were juries establishing them, and the legal profession would become the designers and planners of carrier's equipment, with plaintiff's counsel trying to find fault by hindsight and defense counsel trying to foresee and forestall.

We do not deny that by proper pleading and proof plaintiff would be entitled to attack the design of the Touralux car, in omitting carpet between the seats. The pleading did not come until the close of plaintiff's case, (Tr. 153), after our objection earlier, (Tr. 149). The proof never came. We think it would require expert testimony from a person qualified and skilled in the various problems of railroad train design to furnish such proof. The matters of cost, maintenance, appearance, cleanliness, durability, safety, etc., obviously all have a bearing on design and selection of materials. Doubtless the Touralux may not be perfect, but there is nothing to show that it is not the equal of any modern train design, and to convict the Milwaukee of negligence *per se* simply because the carpet was only in the aisle seems to us wholly unreasonable.

2. *Jury may not review the design and planning of the Touralux car.*

We have not found any case precisely in point, but federal decisions under the Employer's Liability Act seem to establish the principles which ought to govern.

B & O Railroad v. Groeger,
266 U. S. 521, 69 L. Ed. 419,

is a case involving the necessity of using a fusible plug in the crown sheet of a boiler, a question specifically submitted to the jury for decision. The Supreme Court held this wrong, saying:

> "It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. Tuttle v. Detroit, G. H. & H. Co. 122 U. S. 194, 30 L. Ed. 1116, 7 Sup. Ct. Rep. 1166; Richards v. Rough, 53 Mich. 216, 18 N. W. 785. The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, i. e., whether the boiler was in the condition required by the act."

A similar ruling was made with respect to whether a jury might decide that the railroad had constructed two yard tracks too close together.

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place

in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its track and yards. Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries."

Toledo, St. L. & W. R. Co. v. Allen
276 U. S. 165, 72 L. Ed. 513.

A similar ruling was made with respect to whether a jury might decide that the railroad had improperly constructed a drainage system.

"There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries."

Delaware, L. & W. R. Co. v. Koske
279 U. S. 7, 73 L. Ed. 578.

A similar ruling was made with respect to whether a jury might decide that the railroad had negligently failed to require the handle of a certain valve to be turned up.

"Further, there is a fatal infirmity in the new ground of negligence alleged. It involves an engineering problem of railroading, and the judgment of engineers of the Railroad Company may not be reviewed by a jury with a view of finding actionable negligence. The change in the rule, and the omission of the requirement of turning retainer valve handles up, involving a survey of the grades and the brake system employed by the Railroad Company. The judgment of the Railroad Company's engineers in reaching the conclusion they did, may not be reviewed by a jury. Louisville & N. R. Co. v. Davis (C.C.A. 6) 75 F. (d) 849, and cases cited page 850."

Hylton v. Southern Railway Co.
87 F. 2d 393 (CCA 6)

We see no essential distinction, as far as the common knowledge of jurors is concerned, between the spacing of the yard tracks, (Allen case) or the open drainage system (Koske case), and the selection of flooring material. Many railroad operational factors enter the final selection of each, and the ruling should therefore be the same.

A few passenger-carrier cases apply the same principles. In

Byron v. Public Service Transport,
5 A. 2d 483, 122 N.J.L. 326, affirmed 10 A. 2d 733, 125 N.J.L. 91.

the passenger stuck his elbow out the window of a street car and a passing truck injured it. He claimed the car was improperly designed because it had no rear view mirror for the motorman and no window guards. He was nonsuited, the Court saying in part:

"Moreover, there was no evidence tending to show that this trolley car, as respects the lack of such a mirror and window guards on the right hand side thereof, dif-

fered in character from those in common use under like circumstances. There was nothing to show that it was not of standard construction. . . . The onus was upon Byron to establish by evidence that the car construction in the respects complained of was not in conformity with the common standard governing well-regulated common carriers employing like means of transportation. There must be proof of a breach of the duty thus owing to the passenger. The carrier is not an insurer of his safety."

We quote the following from

El Paso Electric Co. v. Barker
(Tex. C. of A.) 137 SW 2d 17, 134 Tex. 496,

"As the jury has found that the turning the corner was the cause of plaintiff's fall to the floor of the bus, and has in effect found that the bus was not turned in a negligent manner, the real question presented is whether or not plaintiff made any proof to sustain her allegation that it was negligent not to have an arm upon the seat. As we view the evidence, there was no proof to show that defendant owed plaintiff the duty of providing for her a seat with an arm. We are further of the opinion that the mere happening of the accident is not proof that defendant owed this duty.

Plaintiff having alleged that there was negligence in failing to have an arm on the seat, it was incumbent upon her to produce evidence to show prima facie that defendant owed the duty of constructing seats with arms. There was no proof whatever upon this point. The only circumstance that existed tending to show such duty is the fact that if there had been an arm upon the seat plaintiff would not have slipped off same. This proves nothing as regards the *duty* of placing an arm upon the seat. The case falls squarely within the rule stated by Shearman and Redfield, quoted with approval by Thompson on Negligence, volume 3, p. 220. Speaking of the character of proof essential in such a situation, it is said, 'There must be *prima facie proof* that the

proximate cause of such injury was a want of something which, *as a general rule,* the carrier was *bound to supply* or the presence of something which, as a general rule, the carrier was bound to keep out of the way.' (Emphasis partly by author.) If it should be conceded that jurors have a right to conclude that it was negligence not to have an arm upon the seat, merely because the presence of an arm might have prevented a fall from the seat, the conclusion would necessarily follow that another jury might conclude that some other injury would not have occurred but for the presence of the arm upon the seat; so that it could be said with the same certainty, based upon the same circumstance, that it was negligence to have the arm upon the seat. We have therefore concluded that there was a lack of proof showing that the absence of an arm constituted 'something improper or unsafe in defendant's appliances of transportation.' See Section 2757, Thompson on Negligence."

A very good case concerning the designing of a railroad car is

Paley v. Palmer, 28 A. 2d 844, 129 Conn. 392,

where it is said:

"His claim is that as he rose to leave his seat one foot was caught between a footrest attached to the seat in front of him and some mechanism under that seat and he was thrown to the floor of the car by the lurching of the train as it was coming to a stop. He charges the defendants with negligence in the way in which the footrest and mechanism were constructed and in the lurching and jolting of the car. The uncontradicted evidence was that the car was a modern air-cooled coach, that the same type of construction was used in about fifty coaches delivered to the defendants by the manufacturer and in coaches in use on several other large railroads, and that no accident caused by the mechanism in question had ever been reported to the defendants' claim agent who had supervision of all

claims arising in Connecticut. These circumstances furnish strong evidence that there was no negligence on the part of the defendants in using the type of construction in the coach. . . . The only basis upon which the jury could have found the defendants negligent was testimony as to the circumstances of the plaintiff's fall and photographs of the footrest and adjacent mechanism. As against the other evidence in the case, this would not reasonably justify a conclusion that the defendants were negligent in using a coach constructed as was the one in question."

Another railroad case is

Houston & T. C. R. Co. v. Werline,
(Tex.) 84 SW 2d 288,

involving a passenger burned by a pipe line beneath the seat. The evidence showed no defect in the equipment, that no other passengers had been injured similarly, and failed to show that a different or safer method was in use by other carriers. The Court held that where the system was of the standard and approved type, customarily used, the plaintiff must show that the prevailing custom is negligent.

A case somewhat analogous is

Valentine v. Northern Pacific,
126 Pac. 99, 70 Wash. 95.

It is a passenger case where the injury arose from a door to the washroom shutting on the plaintiff. Negligence was alleged in that the door had a strong spring which made it close too fast. As in the present case, there was no expert evidence, but just general testimony that the spring was stronger than in other cars, and caused the injury. The court said:

"A careful consideration of the evidence leads us to the conclusion that the case, so far as dependent upon

the first charge of negligence, was properly taken from the jury. It is matter of common knowledge that, when a swiftly moving train passes over even a well-constructed roadbed, there will be much swaying and lurching of the cars from side to side, especially in rounding curves. Common prudence would dictate that a door such as the one here in question should be provided with a spring or some other device having sufficient propulsive force to close and latch the door, and prevent it, when unlatched, from swinging with every lurch of the car. It seems too plain for speculation that any spring which would meet that purpose would cause the door to close with sufficient force to crush a finger inserted between the door strip and the hinge side of the door, as was the finger of the appellant. The evidence shows that on the doors of all cars examined by the appellants some such spring was used. True, both of the appellants testified that by examinations of other cars at times more or less remote from the time of the accident they found no spring so strong as the one on the door here in question. That was the sum of the evidence as to any defect in the door or spring. In view of the necessity and purpose of the spring, that evidence was not sufficient to raise an inference of negligence."

3. *No proof of proximate cause was made.*

As we pointed out above, the element of proximate cause is absent, however the court may feel about sufficiency of the basic proof of negligence. The record can be searched and searched, without finding a solitary shred of proof on which a jury could find that were it not for the composition floor the injury would not have occurred. True, plaintiff says her feet slipped on the floor, but nowhere does she describe the incident in enough detail to enable anyone to say she would not have slipped on the carpet it is

claimed should have been there. One cannot tell from the record whether the jerk produced the slip, or whether the slip made the jerk effective. To bundle the two together into the twin theory adopted by the court only serves to camouflage the point by making it generally relate to both without being actually identified with either. To attempt the actual identification is to plunge directly into speculation and conjecture.

In fact, we think the case falls well within the scope of the Washington case of

> Leach v. School District,
> 85 Pac. 2d 666, 197 Wash. 384

There, the defendant operated a school bus and was treated as a carrier. A pupil passenger was so jostled by another passenger that he lost balance and started to fall, putting his hands out against a glass door panel. The glass broke and he was cut. It was alleged that the carrier was negligent in not having safety glass (like a carpet?) in its door, but the court held:

> "A carrier, however, is not required to adopt and use every new and untried machine or appliance, or the *best in use,* but which is not in general use; * * *" (Italics ours) 10 C. J. 956, § 1374. . . .
> While a carrier of passengers is obligated to adopt new inventions, and to keep pace with new developments in science within reasonable limits, we are not prepared to say that shatter-proof or safety glass was so widely in use under the conditions involved here at the time appellant's injuries were sustained, or that a peril was occasioned by the absence thereof sufficient in character to require its presence, and that the failure to equip the busses with this new device in and of itself constituted negligence. . . .

> In conclusion we do not feel justified in imputing negligence to respondent by reason of its failure to have the doors of its busses equipped with the kinds of glass referred to in the amended complaint for the reason that the situation which presented itself, resulting in appellant's injuries, is not one which may reasonably be anticipated so as to require precautionary measures of that nature to safeguard against its occurrence."

E. *Can two legal, non-negligent acts be combined into a negligent act?*

It seems to us that the court put the jury into an impossible situation by giving the conflicting instructions we have quoted and discussed. Apart from our basic contention that there is no evidence to support the verdict, we further contend this Instruction No. 30 is erroneous for the reasons stated in our objection to it, (Tr. 329-31).

We cannot reconcile the conflict logically. If there was no evidence of a violent jerk, and no evidence of an unsafe floor, viewed separately, (and the court rightly so ruled, (Tr. 311), then the defendant was innocent on both counts. It had done nothing wrong. It breached no duty to plaintiff as its passenger. It had prepared and operated its equipment as required by law. Its liability on each count was zero.

Now, by what legal mysticism can zero plus zero equal one? This cannot be answered by fractions, for an act is considered either legal or illegal, and never half-legal.

By instruction No. 30 the normal train movement could become abnormal, and the safe floor become unsafe. Whereas neither was a proximate cause of plaintiff's injury, both could become the proximate cause. No such legal

metamorphosis is possible, and no jury could be expected intelligently to decide the parties' rights under such circumstances. Our objection that it was confusing, conflicting and incorrect surely should have been sustained.

Of course, it is idle to speculate as to what the jury actually thought about these instructions. They probably concluded that (a), the court was not intending to contradict himself; (b), since there could not be 100% negligence as to the jerk and could not be 100% negligence as to the bare floor, then (c), maybe the court meant that 60% jerk and 40% floor (or 10% jerk and 90% floor—who knows?) would be enough as long as it added up to 100% and involved at least 1% or more of negligence on each count. Whatever they concluded, the verdict is unsound and erroneous unless both counts of alleged negligence are supported by the evidence. This verdict is designed to stand only on two legs and appellee must support it on this appeal by two legs.

This we feel sure counsel cannot do. We say that because frankly we cannot find any published authority or decision for or against this percentage concept of negligence, and we have some confidence that we researched carefully. We find no reference to it in the learned Restatement of Torts, nor in the textbooks available to us. We cannot find a law review article or comment on it, though one would think so novel a doctrine would have had some treatment by the professors and students had it ever emerged in judicial form.

The most telling fact against considering a patchwork of miscellaneous minor sins as a substitute for an act of

legal negligence is that apparently no resourceful plaintiff's attorney has ever attempted the argument before, though the books are full of cases where one or more 100% acts of negligence have been held unproved by the evidence.

Here we are dealing with only two claimed part-acts, but suppose there were a dozen? Frequently a dozen acts of negligence are alleged, and one can well imagine the fantasy of confusion that would be created by an attempt to put a percentage weight on each act to see if the sum total finally reached 100. We cannot believe that so vulnerable and inviting a weakness in the defense has been so long overlooked. This doctrine would not just expose Achilles' heel; it would denude him!

CONCLUSION

For these reasons we contend the verdict and judgment are unsupported in fact and law, and that judgment should be ordered for the defendant in accordance with its motion. This would finally dispose of the litigation.

Failing this, the defendant is certainly entitled to a trial upon correct instructions, for which this judgment should be reversed.

Respectfully submitted,

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No. 12451

United States
Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

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MARY ANN HARRINGTON,

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Appellee's Brief

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STATEMENT OF THE PLEADINGS AND JURISDICTION

Appellant's statement of the pleadings and jurisdiction is accurate, and appellee adopts it as her own.

STATEMENT OF THE CASE

A. *Outline of the issues*—

Appellant's summary of the development of the issues of this case is for the most part accurate. Plaintiff wishes to point out, however, that she has always maintained in her complaint that the defendant's train was negligently put into motion with a violent and unusual jerk. (Par. IV of plaintiff's complaint, and Tr. 5). She has also maintained in her complaint that defendant was negligent in providing a composition flooring which was slippery. (Plaintiff's complaint, Par. IV, Tr. 7). Thus, even though certain theories of negligence advanced by plaintiff in her original complaint were eliminated from the consideration of the jury, there has been no such unusual shift in theory as appellant asserts.

ARGUMENT

Plaintiff's Position:

Plaintiff has contended in this case and still contends that there is sufficient evidence to justify the verdict of the jury for the plaintiff, either

(1) Because of defendant's negligence in starting the train with a violent, unusual and unnecessary jerk, or

(2) Because of defendant's negligence in providing insecure footing between seats by a hard-surfaced composition floor.

Plaintiff believes the jury should have been permitted to decide for plaintiff on the basis of either one of these acts of negligence, and that the trial court committed error in withdrawing the separate consideration of these acts of negligence from the jury. The result of this, however, was to require plaintiff to sustain a heavier burden than she should have been required to sustain. Defendant was in no way injured by this, since plaintiff has been required to and has established two separate acts of negligence as the combined proximate cause of her injury when one would have been sufficient.

Plaintiff wishes to emphasize that the jury was specifically permitted to find negligence in the unusual violent jerk and was further permitted to find negligence in the insecure footing (Tr. 313-14), although

it was not permitted to hold for plaintiff on the finding of negligence in only one of these acts (Tr. 311).

Was There a Negligent, Violent Jerk of the Train?

Obviously, under the instructions of the court, the jury in this case found that the train had been started with a violent, unusual and unnecessary jerk. Defendant doubts the adequacy of plaintiff's evidence as to this violent, unusual jerk. As a basis for its discussion, defendant has set forth certain parts of plaintiff's testimony on direct and cross examination. (Brief of appellant, 9-11). There is certain other testimony which plaintiff believes should be before the court in any consideration of the adequacy of plaintiff's evidence in this regard. The following from the testimony of plaintiff seems pertinent:

"Q. Did your feet slip in any way, Mrs. Harrington?

A. Just with the jerk, they went straight out from under me and I went flat." (Tr. 45)

Q. Mrs. Harrington, could you say at this time whether or not you had struck the arm of the seat or any other objects?

A. No, I couldn't say. The only thing I know, I couldn't open my mouth the next morning with my jaw, so I don't know whether it was just the jar or what that did it." (Tr. 49)

Q. Mrs. Harrington, state whether or not the fall which you experienced in the railroad car was a severe, hard fall, or was it just an easy fall?

A. Oh, my, it was a terrible fall, I thought. I said, 'I am done for.' " (Tr. 89)

Further the testimony of Dr. P. E. Kane on cross examination contains the following matter:

"Q. Of course, the principal fear that most people have to a fall, or elderly people falling, is danger of breaking bones?

A. Yes.

Q. But any fall of a person of her age could result in the bruising of tissue in the surface and interior, could it not?

A. Yes.

Q. That is actually what happened here, was a bruising of the tissue of the kidney?

A. No, it was a tearing of it more than a bruising, a rupturing.

Q. That would not be a surprising consequence of a fall?

A. It would be to me, yes, because we don't see ruptured kidneys very often from any type of injury.

Q. In this case, you believe it resulted from the fall?

A. Yes.

COURT: Then the fall was more than just an ordinary fall?

A. In my opinion, it would be, Judge, yes. I would consider for a ruptured kidney, it would have to have been a severe fall.

Q. Well, Doctor, it might also reflect what sort of object she might have struck in the process of falling, too, isn't that true?

A. I don't know in Mrs. Harrington's case that I could answer that question. In my mind, I doubt very much if that kidney were struck. It may have been. I can't prove or disprove that, only from the history and, as in all accident cases, the patient was very vague. All we know, she hit with force that hurt her back considerably. Whether she struck the kidney proper, or whether it was due to just the force of striking on her back that ruptured the kidney, I am unable to state. I would say it would have to be a severe fall to rupture a kidney.

Q. A severe fall, or probably striking some object in the process of falling?

A. Or a severe blow in that region.

Q. Or a combination of both?

A. Yes. (Tr. 79-80).

Defendant argues that mere adjectives are not enough to impose liability. Plaintiff freely concedes this, but plaintiff's case is not based upon adjectives. It is based upon the physical facts which show the severity of the jerk and the results of that jerk. Plaintiff asserts that there was ample evidence on this subject to justify submission to the jury and obviously there was ample to convince the jury.

It should be emphasized that much of defendant's authority (such as Wade v. North Coast Transportation Co., 5 P.(2d) 986, 165 Wash. 418; Keller v. City of Seattle, 94 P.(2d) 184, 200 Wash. 573) is based upon city street cars rather than railway streamliners. Of course, the standard of care (the highest degree

consistent with practical operation) is the same in each case, but the amount and degree of jerking which will be violent and unusual is manifestly very different. There is a distinction between passenger trains and freight trains in this regard (Wile v. Northern Pacific Railway Co., 129 Pac. 889, 72 Wash. 82).

> "It is a matter of common knowledge that jolts and jerks are usual incidents in the operation of freight trains and therefore negligence cannot be inferred from the mere fact that a passenger's injury resulted from a jar, caused by the sudden stopping of such a train. In other words, a jar, or jerk, in a freight train, is not of itself evidence of negligence."
>
> 2 White, Personal Injuries on Railroads, 670.

The same would apply, probably in a somewhat lesser degree, to the operation of a street car as evidenced by defendant's authorities.

But what of the Milwaukee Olympian, defendant's de luxe streamliner so proudly presented in Appendix A of appellant's brief? Are jolts and jerks usual incidents of travel in such a carrier? Is a passenger bound to anticipate severe jerking? It seems unlikely, and defendant's own witnesses emphasize this point. The following occurred during the examination of the porter, Jesse Love:

> "Q. Just tell me one trip you recall a jerk on.
>
> A. Sometimes it is a little jerk, but it is a very smooth train.
>
> Q. A very smooth train?

A. Yes, sir.

Q. If there were a severe jerk, it would be unusual, wouldn't it, Mr. Love?

A. Yes, sir." (Tr. 227)

Also the point was covered during the examination of the engineer, George Edward Tierney.

"Q. Would there be any jerking of the train if that were to happen?

A. No, sir.

Q. In other words, this train is jerk-proof?

A. Yes, sir, pretty near." (Tr. 266)

So if there was a violent jerk, it was unusual and unnecessary. Facts show that there was such a jerk. Plaintiff's testimony shows a very severe fall. It shows a jerk in starting the train sufficiently strong to throw plaintiff from a balanced, standing position into the serious fall which she has described. The testimony of plaintiff's attending physician shows that the injuries resulting from plaintiff's fall are an indication of its severity and that to account for those injuries the fall would have to be more than ordinary, would have to be severe. This would point directly to the unusual severity of the jerk under the testimony of plaintiff and her physician, which testimony the jury was entitled to believe and did believe. The following Washington cases are important in regard to the physical evidence establishing the nature of the jerk:

Atwood v. Washington Power Co. (1914) 79 Wash. 427, 140 Pac. 343.

The plaintiff, a passenger on a street car, was thrown backward by a violent jerk before reaching her seat. The plaintiff and relatives who accompanied her on the street car characterized the jerk as the most violent they had ever experienced. The verdict for plaintiff was upheld in Supreme Court. The Court said:

> "In Work v. Boston Elev. R. Co., 207 Mass. 447, 93 N. E. 693, cited by appellant, the court, after observing that jerks while running, and jerks in starting and stopping to take on and let off passengers, and lurches in going around curves, are among the usual incidents of travel in electric cars which passengers must anticipate, and that if a passenger is injured by such a jerk, jolt, or lurch there is no liability, said:
>
> " 'On the other hand, an electric car can be started and stopped, for example, with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence and the company liable. The difference between the two cases is one of degree. The difference being one of degree and one of degree only, it is of necessity a difficult matter in practice to draw the line between these two sets of cases in which opposite results are reached. No general rule can be laid down. Each case must be dealt with as it arises . . . The plaintiff, to make out a case, must go further than merely to characterize the jerk, jolt or lurch and must show (1) by direct evidence of what the motorman did that he was negligent in the way that he stopped or started the car (as in Cutts v. Boston Elevated Railway, 202 Mass. 450), or (2) by evidence of what took place as a physical fact . . .'
>
> "It will be observed this differentiation is covered by the testimony in the case at bar. The testimony

is that the jerk was not only unusual, but the most unusual that witnesses who were accustomed to riding on street cars had ever experienced. In addition to this, the evidence discloses what took place as a physical fact; that is, it shows the physical result of the alleged negligence."

Cassels v. Seattle (1938)
195 Wash. 433, 81 P.(2d) 275.

The plaintiff, seventy-two years of age and of impaired mental faculties, was on a street car with a companion. As she rose to go to the exit the car stopped suddenly with a jerk, throwing her to the floor and injuring her. There was a dispute as to the severity of the jerk. Plaintiff's companion, a younger woman, was only slightly injured and was awarded no damages. Plaintiff, however, was awarded substantial damages and the defendant appeals. The Supreme Court held that where evidence as to the nature of the jerk is in dispute the question is properly one for the jury. On page 437 the Court said:

"Appellant contends that, since the jury awarded Mrs. Gay no damages, it must have disbelieved her testimony as to negligent operation. This does not follow, because there was such a disparity between the ages of Mrs. Gay and respondent that what was negligence with respect to one might not constitute negligence with regard to the other. In addition, the injuries suffered by respondent were of a character much different than those which Mrs. Gay alleged she sustained. The testimony is conflicting as to whether all the seats in the street car were filled with passengers, and quite a number of people were standing.

"The court correctly instructed the jury with respect to contributory negligence, and under the facts disclosed by the record that was a question for the jury to determine."

Again the court emphasized:

"To support a claim for damages occasioned by jerks and jolts on a street car, there must be evidence that the facts and circumstances surrounding the injury show negligence." Wile v. Northern Pacific Ry. Co., 72 Wash. 82, 129 Pac. 889; Annotations 29 LRA (NS) 814.

"It is, however, actionable negligence to cause a street car to give a violent or unusual jerk causing injury to passengers." (Citing cases)

Humphreys v. Seattle (1929)
152 Wash. 339, 277 Pac. 834.

Plaintiff brings action for personal injuries, claiming he was thrown to the floor of the street car by a sudden violent jerk. The jury brought in a verdict for the defendant and the trial court granted a new trial. Upon appeal, defendant claims there was insufficient evidence to go to the jury. Our Supreme Court said on page 341:

"The plaintiff testified that she was thrown violently to the floor because of the sudden jerk or lurching of the street car which she had boarded, and that this sudden jerk or lurching took place before she had an opportunity to secure a seat. She testified fully and completely, not only as to the nature and extent of the injuries which she suffered, but also as to the fact that this was a sudden, unexpected, violent and unusual jerk of the car, and that it was this which threw her

down and caused the injuries. A number of witnesses testified to the contrary. Under such a state of facts, a directed verdict would not have been proper, nor would a judgment non obstante veredicto have been permitted to stand. Caughren v. Kahan, 86 Wash. 356, 150 Pac. 445; Payzant v. Caudill, 89 Wash. 250, 154 Pac. 170."

It should be remembered also that, negligence being failure to use due care under the circumstances, the jerk in question must be judged in relation to the uncertain footing to be considered later and in relation to the age and condition of plaintiff. Rice v. Puget Sound Traction Light & Power Co., 80 Wash. 47, 141 Pac. 191.

Whether or not a young, vigorous person standing on rugging could have withstood the violence of the jerk is of absolutely no concern to us here.

Defendant argues that plaintiff fell to the side rather than backwards against the rear seat. This indicates to defendant that the jerk of starting the train could not have caused the fall. The complete answer to this is that it is not shown that plaintiff fell sideways. She may well have been propelled against the rear seat and then into the aisle. The following is from plaintiff's testimony on cross examination:

"Q. Do you know whether you hit the seat before striking the floor?

A. No, I don't." (Tr. 107)

Plaintiff's reference to the jerk being like one car bumped into another or like a coupling of cars, when

taken in conjunction with the rest of plaintiff's testimony and the effects of the jerk, in no way justifies the conclusion that this was like an ordinary careful coupling of cars. The jerk produced by coupling cars can be violent or non-violent, unusual or ordinary. The use of the phrase "like coupling of cars" in no way characterizes the jerk as an ordinary one, and defendant can claim no comfort from this characterization.

Whether certain witnesses who testified by deposition told a more accurate and believable story of how the fall occurred, as defendant asserts, is of course a matter for the jury to determine, and the verdict of the jury for plaintiff is an ample demonstration of which witnesses were considered more credible by the jury. There was sufficient evidence of the nature and violence of the jerk to carry the matter to the jury, and sufficient to convince the jury.

Was There Negligence in Providing a Composition Flooring Between the Seats Rather than Carpeting?

It should be emphasized at the beginning that plaintiff offered testimony of Norman Hamill, a qualified architect, as to the footing given by the various floors installed on the train (Tr. 148). Plaintiff's witness was not permitted to give this testimony, the court holding (Tr. 152) that the question was within the province of the jury to determine. The jury obviously found that the composition flooring was not as safe as rug flooring and that there was negligence in failing

to provide such safer floor covering. It should be remembered that the defendant railroad was under a duty to foresee that persons of the age and physical condition of the plaintiff would be using the flooring. It should further be remembered that defendant's negligence should be judged in view of the violent jerking to which plaintiff has testified she was subjected.

We submit that consideration of cost, maintenance, appearance, cleanliness and durability, which obviously were so important to defendant (appellant's brief 21) should never be permitted to override consideration of safety. Defendant owed plaintiff the highest degree of care consistent with practical operation of its railroad. Surely it would not be inconsistent with practical operation to have provided as safe footing between the seats as defendant provided in the aisles (and, indeed, between the seats of the de luxe cars). Safety is not a matter of price or class of ticket.

> "The mere fact that the precautions necessary to avoid injury to others are so expensive as to consume all the profits of the business, is not enough to show that such precautions are unreasonable." Shearman & Redfield on Negligence, p. 14.
>
> "The mere cost of giving to another that protection to which the law says he is entitled should never be accepted as an excuse for failure to provide it." Salt River Valley W. U. Assn. v. Compton, 39 Ariz. 491; 8 P.(2d) 249; 40 Ariz. 282; 11 P.(2d) 839.

The defendant, while admitting it has no cases directly in point, claims that the jury cannot decide whether defendant was negligent in providing a composition flooring rather than a rug between the seats. To justify this conclusion, defendant cites a series of cases which do not support the conclusion which defendant seeks to draw from them. Defendant's cases (appellant's brief 22-27) involve such complicated engineering installations as a fusible plug in the crown sheet of a boiler, or the spacing of yard tracks, or the installation of a drainage system, or the location and position of a certain valve. Certainly these are technical, scientific matters. Certainly many technical considerations might enter into the determination of the placement of a fusible plug in the crown sheet of a boiler which would be beyond the knowledge or experience of the average juror. However, there is nothing in the question of placement of a rug or composition flooring and in the relative security of the two floorings which is beyond the experience of the same average juror. Plaintiff is convinced that a careful reading of the cases will show in each case an engineering question involved in the installation being questioned, a decision as to which would be beyond the average juror. Even in the case of a pipeline, a footrest, and a spring on a washroom door, it seems obvious that there are detailed engineering questions involved. But to argue from these cases that the judgment of the railroad as to the make-up of its cars is in every case unassailable is to seek a conclusion which does not follow.

As an extreme example, if a railroad built a group of cars with a hole in each aisle, covered by material insufficient to support a person's weight, and a passenger was injured thereby, it would seem obvious that the fact that the railroad car was intentionally so constructed by the railroad would not excuse that railroad from liability. So in the present case the negligence or non-negligence of defendant rests upon facts within the knowledge of the jury, and the jury does not have to set itself up as an engineering expert in order to determine that negligence. Plaintiff offers one case which she believes is very closely in point. It is Harris et al v. Smith et al, 112 P.(2d) 907. This is a California case in which a prospective tenant stepped from a heavily carpeted lobby floor into an elevator. The elevator floor was linoleum, waxed and polished. The prospective tenant slipped, fell and was injured. A judgment for plaintiff for damages was affirmed on appeal. The court held that the evidence supported a finding that the linoleum was waxed and polished, that no rubber or leather mat or carpet was superimposed to prevent passengers from slipping and falling, and that the use of them would have afforded greater safety to passengers.

The owner of the elevator was held negligent under a California statute requiring the exercise of "utmost care."

In this case the trier of fact was permitted to find negligence in the furnishing of a polished linoleum

floor rather than another covering which would have afforded greater safety. Similarly, the jury in the present case was permitted to find negligence in a composition flooring rather than a rugging which would have afforded greater safety.

Proximate Cause

The jury, believing plaintiff's testimony, could hold that this accident happened as the result of an unusual jerk and of the failure to provide proper floor covering. It is idle to speculate as to whether plaintiff would still have been injured if she had been standing on carpeting. Both acts of negligence were those of defendant and its agents. The two acts in conjunction produced the injury, and speculation as to the degree of responsibility of each individual act of negligence is idle and unnecessary. As stated in Bradley v. Seattle, 160 Wash. 100; 294 Pac. 554:

> "When an injury occurs to a passenger for hire through some conveyance or apparatus of the carrier, in the absence of other showing, it must be assumed to have been due to the negligence of the employees of the carrier which is imputable to the employer."

The present situation is distinguishable from Leach v. School District 197 Wash. 384; 85 P.(2d) 666, in that there the two acts of negligence were on the part of two different individuals. Here the failure to provide adequate flooring must be considered in conjunction with the unusually violent jerk, and the jerk

must be considered in conjunction with the failure to provide adequate safe flooring.

Concurrent Causes—Two or More Acts of Defendant Causing Injury

Appellant claims error in the giving of Instruction No. 30 by the trial court, which instruction reads as follows:

> "You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling as a passenger in Section 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant." (Tr. 313-314).

In support of its assignment of error in this regard, appellant has adopted a ringing battle cry of "Zero plus zero equals one"; and repeats this cry throughout his brief. This slogan may vividly portray appellant's contentions, but, unfortunately, its mathematics are faulty. A more proper phrase would be "one-half plus one-half can and does equal one." This is clearly so because the two claimed acts of negligence, as committed by appellant railroad, each make up a

portion of appellee's case and added together equal the entire proximate cause. Neither of such negligent acts, as set forth in this instruction, namely, the jerk of the train or the slippery asphalt tile floor, would have to constitute the entire proximate cause of the injury in itself. The proper rule is set forth as follows:

> "Where either one of two defects alone would not have caused injury, the two defects together constitute the proximate cause, although each contributed in an unequal degree." 45 C. J., page 907, Sec. 480.

Therefore, despite appellant's contention that appellee's counsel have unearthed a new and novel doctrine of law, unknown for centuries, and despite appellant's contention that the trial judge incorrectly adopted such new and novel theory of law, the true fact appears to be that appellant did not make sufficient research into the known law, as there are cases clearly adopting and setting forth the previous rule as contained in 45 C. J. at page 907, Section 480.

Some of the cases which clearly follow this rule and which would be sufficient basis to authorize the court's instruction No. 30 to the jury in the present case are as follows:

> McGregor v. Reid, etc., Co.,
> 178 Ill. 464, 53 N. E. 323

holding that thus the proximate cause of an accident from the falling of an elevator where the cable pulled out and the "dogs" failed to work, neither of which

alone would have caused the fall, is not the pulling out of the cable alone, but that and the condition of the "dogs." The court stated:

> "The two causes operated together and neither alone would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the negligence of appellee, appellee would be liable, for both causes operating proximately, at the same time, caused the injury. 16 Am. & Eng. Enc. Law 44."

The Court in said case went on to say that it was for the jury, and not for the Court, to decide whether there was a defective condition and whether it was known to the owner of the conveyance.

> Etheridge v. Norfolk Southern Railway Co. (Virginia) 129 S. E. 680

wherein the Court stated:

> "As a matter of primary definition it would probably not occur to the wayfaring man that an accident could be the result of more than one proximate cause and it is reasonably clear that he would believe that such an expression was intended to designate that cause which in a major degree brought about the result under consideration. This, however, is not necessarily true. A cause without which something would not have happened is a proximate cause, but it is not necessary that such cause be the major cause. It is also true that there may be more than one proximate cause. Heat, moisture and springtime may stir a dormant bud; each would be a proximate cause and this would not be changed, even though

> it should appear that they contributed to that result in an unequal degree."

Similarly, it is respectfully submitted, the jerk of the appellant's supposedly "smooth-running" streamliner and the slippery footing afforded appellee by the car's asphalt tile floor (economic though it might be to install and to clean) could both properly be proximate causes when considered together.

In City of Louisville v. Hart's adm'r (Kentucky) 136 S. W. 212, on pages 215 and 216, the Court clearly sets out the rule where two acts occur to cause the damage, which neither alone, by itself, could cause:

> "Two agencies acting entirely independent of the other as in this case may jointly and concurrently be the proximate cause of an injury, when it would not have happened except for the concurrence at approximately the same time and place of the two negligent acts";

citing Cooley on Torts, p. 78, and Shearman and Redfield on Negligence, Section 39, also Section 346.

Also in the case of

> Palyo v. Northern Pacific Railway Co.,
> 144 Minn. 398, 175 N. W. 687

the same rule was adopted. In that case plaintiff, a passenger on one of defendant's trains, was injured on March 21, 1921, while alighting from the train. Accompanied by Mr. and Mrs. Thurston and their children, plaintiff boarded the train at Baudette to go to Graceton in Minnesota. On arrival at Graceton Mr.

Thurston got off first. As Mrs. Thurston, followed by plaintiff, was getting off, the train began to move. Mrs. Thurston got off but plaintiff fell or was thrown from the steps of the day coach and was injured. Plaintiff testified the brakeman seized her arm, said "come on," and pulled her from the steps, and she is corroborated by Mrs. Thurston and one of the children. She is contradicted by the brakeman and by defendant's assistant superintendent, who was an eye witness. Verdict for plaintiff, and defendant's appeal from an order denying their alternative motion for judgment or a new trial. Held: Judgment for plaintiff affirmed. The Court there stated:

> "The attention of the jury was called to Section 4399 G. S. 1913, and they were instructed that defendants were negligent in starting the train before plaintiff got off, but that such negligence was not to be considered unless it was the proximate cause of her injuries. Defendants insist it could not be a proximate cause, in view of plaintiff's testimony that she did not intend to get off until the train stopped and would have stayed where she was if the brakeman had not pulled her off. We are of a contrary opinion. *If plaintiff's testimony is true, two acts combined to produce the injury: The setting of the train to motion before she got off, and the brakeman's act in getting her off after the train was in motion. Defendants were responsible for both acts. In combination, they caused plaintiff to fall upon the station platform. Each was a proximate cause of her injury.* Palyo v. N. P. Ry. Co., 144 Minn. 398; 175 N. W. 687." (Italics ours.)

Also two or more concurring acts of negligence combine to cause an injury in the following cases:

Lake v. Emigh (Mont., March 1948)
190 P.(2d) 550.

Action by Tyyne Lake against John Emigh, as administrator of the estate of Eli Virta to recover for injuries sustained by plaintiff while a tenant in defendant's building. Judgment for plaintiff and defendant appeals.

Virta was the owner of three houses on the corners of Lee Avenue and Broadway in Butte. In the rear of the houses were three clotheslines. The line involved in the case was a rope running over pulleys from the house to a telephone pole in the rear. It was necessary to ascend a ladder six or seven feet high, the top of the ladder was nailed to the house, and there was a board eight inches wide and twenty inches long upon which the person using the line to hang clothes had to stand. On November 25, 1935, while plaintiff was hanging clothes from said ladder, the clothesline broke and she fell a distance of six or seven feet to the ground and suffered the injuries complained of. Two grounds of negligence were alleged:

(1) That defendant and his agents allowed the clotheslines to become weak and rotten and not in a reasonably safe condition for the use for which they were intended.

(2) That defendant allowed the ladder to become

loose from its fastenings and become unsteady and not in a reasonably safe condition for use. Defendant pleaded contributory negligence of plaintiff as the sole cause of her injuries. Held:

> "We will now consider the contentions advanced by defendant." ". . . Second, that the breaking of the clothesline was not the proximate cause of the plaintiff's injuries because of intervening causes, including the narrow platform, lack of any handhold, and the shaking of the ladder, all of which it is claimed broke the sequence of events and were new and independent causes of plaintiff's injuries. If the lack of a handhold, the narrowness of the platform and the shaky condition of the ladder were contributing causes to plaintiff's injuries, it is sufficient to say that defendant was responsible for all of said causes and it is immaterial which of them was the proximate cause of plaintiff's injuries. 45 C. J. Sec. 487, page 924, states the law as follows: 'Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery may be had against either or all of the responsible persons, although one of them was more culpable, and the duty owed by them to the injured party was not the same. Where the injury results from two or more causes for all of which defendant is liable, it is immaterial which was the proximate cause.' " (Citing authorities in the accompanying case notes.)

See also

> Oklahoma Gas & Electric Co. v. Butler (Okla. 1942); 124 P.(2d) 397

in which the Oklahoma Court announces the same rule in effect:

> "We deem it unnecessary to deal further with the matters raised by defendant's contention, in view of the announced principle that where several causes produce an injury, and each is an efficient cause without which the injury would not have occurred, then the injury may be attributed to any or all of such causes."

The Oklahoma Court in

> M. & D. Motor Freight Lines v. Kelley
> (Okla. 1949) 202 P.(2d) 215

stated as follows:

> "Where although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."

> Hild v. St. Louis Car Co.
> (Mo. 1924) 259 S. W. 838

Plaintiff worked for defendant's mill several days and was then transferred to the blacksmith shop as a blacksmith's helper. Plaintiff was instructed by the blacksmith how to operate a bending machine. Sparks from a nearby molding hammer flew over by the bending machine plaintiff was working on, and on this particular occasion said sparks hit him in the face and neck and he dodged; in so dodging he hit the operating lever for the bending machine with his left hand, opening it a little, which allowed compressed air to enter the chamber slowly; when plaintiff reached for a piece

of metal to remove from the machine the chamber filled with air and the piston came forward and the dies closed before he could get his fingers out. Verdict for plaintiff, the defendant appeals. Defendant pleads contributory negligence on plaintiff's part. Held: Judgment for plaintiff affirmed.

> "It is not the law that plaintiff may not go to the jury upon one negligent act of defendant shown to have proximately contributed to plaintiff's injury merely because some other negligent act of defendant also contributed to the injury and the plaintiff would not have been injured without the concurrence of such other act. We cannot subscribe to the doctrine that plaintiff is not entitled to recover for one negligent act of defendant proximately contributing to plaintiff's injury because the injury would not have resulted without the concurrence of another negligent act of the defendant. The injured party may recover for any negligent act directly contributing to his injury, regardless of what other negligent act may contribute, concur, or co-operate to produce the injury."

See also:

> Carr v. St. Louis Auto Supply Co.,
> Mo. 239 S. W. 827, at p. 829;
>
> Spaulding v. Metropolitan Street Railway Co.
> (Mo.) 107 S. W. 1049;
>
> Meeker v. Union Electric Light & Power Co.
> (Mo.) 216 S. W. 923;

and other cases cited on page 841 of

> Hild v. St. Louis Car Co.,
> 259 S. W. 838.

Cole et al v. Gerrick et al
(Wash. Feb. 1911), 113 Pac. 565:

Action to recover damages for defendant's alleged negligence which caused the death of George Cole, husband and father of plaintiffs. The intestate was employed as a structural iron worker for defendant on a new building being constructed in Tacoma. The intestate was engaged with another iron worker and the foreman in attempting to place in permanent position an iron channel beam, weight three hundred (300) pounds, which was twelve feet long, on the thirteenth floor. The foreman passed on a signal to have the beam lowered, but the signal was misinterpreted or not properly obeyed by the operators of the crane and so, instead of lowering the beam it was swung toward the inside of the building. Cole was holding onto the beam to steady it into position and by this unexpected movement he was pulled toward the interior before he could leave go and in attempting to regain his balance he fell outside of the wall and down to the sixth floor and met his death. The wall Cole stood on had been built just the day before and had not yet set, so the bricks were easily displaced, and in attempting to regain his balance Cole loosened a couple of bricks, rendering his footing less secure. The negligence plaintiffs rely on was the wrong signal being given and also defendants attempting to place the beam in position before the wall had set enough to make it a safe place to work. Defendants assert as a defense contributory negligence

of Cole in going on the wall while it was in an unsafe condition. Judgment for plaintiff. Held: Judgment for plaintiff affirmed. The Court said:

> "It is contended that the appellants were not responsible for the condition of the wall, since the building of it was no part of their contract. We think there was good ground for contending that appellants' foreman knew of the unsafe condition of the wall, and also knew that in placing this channel the iron workers would probably walk upon the wall as Cole did, and also that Cole was not warned of the condition of the wall. However, even if appellant was not responsible for the condition of the wall as a concurring cause of Cole's fall, that fact would not relieve appellant, if the jury believed the fall of Cole would not have occurred but for the error in communicating or obeying the signals, thereby causing the wrong and unexpected movement of the channel. And we have seen this question was for the jury. This contention is well answered by the mere statement of the elementary rule found in 2 Labatt, Master & Servant, at Sec. 813, as follows: 'Where several causes concur to produce certain results, any of them may be termed "proximate," provided it appears to have been an efficient cause. The general rule applicable to all cases illustrating this situation, except those in which the contributory negligence of the servant himself is involved, is that, in order to establish the right of action, it is merely necessary to show that one of the cooperating causes of the injury was a culpable act or omission for which the master was responsible. This rule holds good whether the other causes were also defaults for which he was responsible, or were due to some event or some conditions for which he was not required to answer.' To the same effect is Black's Law and Practice in Acci-

dent Cases, Sec. 21. The liability of the appellants growing out of the wrong communication of or erroneous acting upon signals under such conditions as this evidence tends to prove we think has been fully established by former decisions of this court."

Westerland v. Pothschild,
53 Wash. 626; 102 Pac. 765.

In a recent case (1940) the Supreme Court of the State of Washington passed upon a case somewhat similar to the instant one in

Eckerson v. Ford's Prairie School District
No. 11, 3 Wn.(2d) 475.

In that case a little girl was hurt in a schoolyard accident when she stumbled on the apron of a top step, which apron protruded above the school grounds a very slight distance. After so stumbling, the little girl continued off-balance down the steps until she suddenly collided with a glass, unscreened door in close proximity to the foot of the stairway, which door was suddenly slammed shut by a schoolmate. The Court said:

"There can be little doubt that the elevated condition of the top step, or apron, was an actual cause, or cause in fact, of respondent's stumbling and, further, that but for the position of the unscreened, glass-paneled door in close proximity to the foot of the stairway, the accident would not have resulted in the way that it did.

"From the evidence in the case, the jury could logically find that these factors, taken in connection with the fact that the children were permitted to play on the stairway, constituted negligence on

the part of appellant, and that there was a necessary causal connection between such negligence and the injuries sustained by respondent.

"Appellant insists, however, that even if it be held that there was primary negligence on its part, the chain of causation was broken by a new, independent and intervening act of negligence committed by the boy who suddenly slammed the door shut, and that his act was unforeseeable, and, accordingly, eliminated from appellant's negligence its proximate causality and became, instead, the superseding cause. This contention may be disposed of on either one of two grounds.

"In the first place, it was within the province of the jury to determine whether the act of the boy was a superseding cause, or simply a concurring one. The jury may well have found, under the evidence, as it apparently did, that the injury was traceable to the negligent condition of the top step, and that such condition was the proximate cause without which the injury would not have occurred; further, that while the negligent act of the boy was also a proximate cause, it merely combined or concurred with the continued effect of appellant's negligence to produce the result, but did not supersede it.

"The rule in such cases, as stated in Restatement of the Law of Torts, 1184, Par. 439, is that:

'If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.'

"This court has consistently followed that rule. Eskildsen v. Seattle, 29 Wash. 583, 70 Pac.

64; Cole v. Gerrick, 62 Wash. 226, 113 Pac. 565; Thoresen v. St. Paul & Tacoma Lumber Co., 73 Wash. 99, 131 Pac. 645, 132 Pac. 860; Hellan v. Supply Laundry Co., 94 Wash. 683, 163 Pac. 9; Duggins v. International Motor Transit Co., 153 Wash. 549, 280 Pac. 50; Caylor v. B. C. Motor Transportation, Ltd., 191 Wash. 557, 85 P.(2d) 1064."

It seems clear in our present case that the accident and the serious injury to appellee resulted from the jerk or jolt of this train under circumstances where appellee's footing was insecure by reason of the slippery asphalt tile floor on which she was compelled to stand. The reasoning of the Washington Court in said case of Eckerson v. Ford's Prairie School District No. 11, applies to a school child, it is true, but in our present case we have an elderly lady, and it would appear that the railroad company should have foreseen the hazard of such an asphalt tile floor in combination with a jerk or jolt of said train, just as the Washington Court in the Eckerson case held that the School District should have foreseen the hazard of the slightly defective step combined with the proximity of the glass door.

Also see

Seibly v. Sunnyside,
178 Wash. 632, 35 P.(2d) 56.

By way of further comment upon appellant's ringing phrase of "Zero plus zero equals one," it may be said that there are not too many factual situations wherein an injury is caused by two independent acts or agencies joining together to be jointly and concur-

rently the proximate cause. However, because this happening does not occur more often is no valid reason to attack the rule of law which we have set forth and upon which the trial court based its instruction No. 30.

Two or More Acts of Defendant Causing Injury—Question of Proximate Cause

45 C. J. Negligence, Sec. 487, page 924.

> "Injury attributable to all or any one of several concurrent causes. Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes and recovery may be had against either or all of the responsible persons, although one of them was more culpable, and the duty owed by them to the injured person was not the same.
>
> "*Where the injury results from two or more causes for all of which defendant is liable, it is immaterial which is the proximate cause.*" (Italics ours)

Also this rule is set forth in Thompson on Negligence, Vol. I, Sec. 69:

> "Injury from Several Causes for All of Which the Defendant Is Responsible.—The question of proximate cause does not arise in an action for personal injuries occasioned by an accident resulting from two or more causes, for all of which the defendant is responsible."
>
> Newcomb v. New York Central & H. R. R. Co. (Mo. 1904) 81 S. W. 1069.

In this case plaintiff was a passenger from St. Louis to New York; the part of the route plaintiff

traveled on defendant's train was to be from Buffalo to New York. Plaintiff had a twenty-minute lay-over in Buffalo where he met a friend, Mr. Knox. Plaintiff was mistaken in his belief that Mr. Knox and he were to go on to New York together, for Knox was to go by the "West Shore Line" and plaintiff by New York Central. They saw no usher to direct them to the train; plaintiff became separated from Mr. Knox and, seeing a train moving, asked a porter on that train if it was the train to New York; the porter said yes, so plaintiff boarded it. Plaintiff then learned he was on the wrong train and the porter told him to jump off. The train was then moving very slowly. Plaintiff jumped to the platform from the stairs of the car. The platform had an incline at this point descending about one-half inch to the foot, and on the incline was grease or oil. Plaintiff, when he landed on the platform, slipped and fell and slid under the car and his leg was run over so seriously that it later required amputation. There was a lateral space of seven inches between the edge of the platform and the step of the car, and expert witnesses testified this was an unsafe condition and increased the danger to people getting off trains. From a judgment for plaintiff defendant appeals a second time.

One of plaintiff's instructions was to the effect that if plaintiff found the train he left at Buffalo had moved to another track and if defendant failed to exercise reasonable care to direct him to it and as a

result of defendant's failure to so conduct itself, plaintiff got on the wrong train, and when he got off said wrong train slipped and fell, then such omission of defendant to exercise ordinary care was negligence. The Court affirmed, with the following comment:

> "Another objection made to this instruction is that the negligence referred to therein was not the proximate cause of the accident. It was the cause of plaintiff's being in the position from which, in trying to extricate himself, the injury resulted. Unless, therefore, between the getting into that position and the accident, some other cause intervened, the act of the defendant which led the plaintiff into the position was the direct cause of the accident. And if there was another cause intervening, which combined with the former act to produce the injury, and if the defendant was responsible for that cause also, it cannot be held to be such an independent cause as to relieve the defendant from liability for its initial act of negligence; that is to say, if the defendant's negligence was the cause of the plaintiff's getting on the wrong train, and he was injured in trying to get off without any negligence on his part, the fact that the danger attendant on his alighting was increased by the further negligent act of the defendant in reference to the condition of the platform would not relieve the defendant from liability for its first act of negligence on the ground that it was remote from the accident. In Thompson on Negligence, Vol. I, Sec. 69, it is said: 'The question of proximate cause does not arise in an action for personal injuries occasioned by an accident resulting from two or more causes for all of which defendant is responsible.' There was no error in the instruction."

Kraut v. Frankford and S. P. City Pass. Ry. Co. (Pa. 1894) 28 A. 783

Defendant had two tracks on Berks Street and plaintiff intended to cross same. When plaintiff reached the corner and before he left the pavement he saw a car coming east on Berks Street, on the track further from him, and twenty or thirty yards from the crossing. He started to cross Berks Street, supposing he could do so before the car reached him. After crossing the first track he saw the car was coming fast, so stopped and stepped back. As he did so his foot sank into a hole or among loose cobblestones and he was thrown forward; he fell with both arms across the track and the hind wheel of the car ran over him, causing injuries which required amputation. Held for plaintiff. Held on appeal: Judgment for plaintiff affirmed.

> "The duty of the defendant to keep the street in proper repair, and the fact that the car approached the crossing at an unusually rapid rate, were either admitted or so clearly established at trial as not to be in dispute . . . There seems to be no sufficient reason for entering upon any discussion of remote and proximate cause to which so much attention was given by counsel for the appellant on the trial of the case and its argument here . . . If either cause had been absent the accident would not have happened. The unusual speed of the car and the defective crossing were both factors, and, as the defendant was responsible for both, it is useless to speculate as to which was the remote and which was the proximate cause."

Williams et al v. Chicago B. & Q. Ry. Co. (Mo. 1913) 155 S. W. 64

Plaintiff is the curator of two minor children, ages three and six, whose father was killed in a wreck of one of defendant's trains. It was shown the train was going south at thirty-five miles per hour. There was evidence, such as indentation of the ties and jolting of cars noticed by passengers, which tended to prove that one or more cars left the rail about 450 feet before reaching the place of the wreck, but the train ran safely that distance and then, after passing over a switch, began to break and tear up rotten and defective ties for a space of 150 feet, causing the wreck. Defendant claims the proximate cause was the leaving of the rail 450 feet away from the scene of the wreck, for which it was not chargeable, and not the defective track and roadbed as charged in the petition. From judgment for plaintiff defendant appeals. Held: Judgment for plaintiff affirmed.

> "The fact that the wheels of a car in a passenger train leave the rail and run along on the ties, showing no sign of a defective wheel or trucks, is evidence tending strongly to show, prima facie, that there was a defective track or roadbed as charged in plaintiff's petition at that point also and it can well be regarded as proved that defendant was guilty of negligence at both places, or, to express it differently, was negligent in both causes. The Supreme Court in quoting from 1 Thompson on Negligence, Sec. 69, says that: 'The question of proximate cause does not arise in an action for personal injury occasioned by an

accident resulting from two or more causes, for all of which the defendant is responsible.' Newcomb v. Railroad, 182 Mo. 687, 721; 81 S. W. 1069. In Kraut v. Railroad, 160 Pa. 327, 335; 28 Atl. 783, the Court said: 'If either cause had been absent, the accident would not have happened . . . and, as the defendant was responsible for both, it is useless to speculate as to which was the remote and which the proximate cause.'

"There is another view which supports plaintiff's case, even conceding defendant not to be chargeable with negligence in the car leaving the track before reaching the point of the wreck. If the act alleged as the ground of the action (defective track at place of wreck) is the cause, it need not be the sole cause. If there is another cause in addition to the negligence alleged, the latter 'would be held a concurrent cause.' I White's Personal Injury on Railroads, Sec. 26. The fact that one of the cars 'climbed the rail' before reaching the defective ties where the wreck occurred was not the sole cause of the injury, for the injury would not have occurred but for the concurring cause of decayed and rotten ties. The latter is therefore a proximate cause, for which defendant is liable." (citing cases).

In Ring v. City of Cohos, 77 N. Y. 83, 90, it was stated:

"When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened."

Concurrent Causes in General

From previously cited cases it will be seen that the law of the State of Washington, as set forth in the decisions of its Supreme Court, follows the general rule in respect to joint and concurrent causes as set forth in 38 Am. Jur. Negligence, Sec. 63:

> "An injury cannot be attributed to a cause unless, without it, the injury would not have occurred. Accordingly, the mere concurrence of one's negligence with the proximate and efficient cause of a disaster will not impose liability upon him; it is well settled, however, that negligence in order to render a person liable, need not be the sole cause of injury. It is sufficient for such purpose that it was an efficient concurring cause, that is, a cause which was operative at the moment of the injury and acted contemporaneously with another cause to produce the injury, and was an efficient cause in the sense that, except for it, the injury would not have occurred . . . Under the rule that the Court will trace an act to its proximate and not to its remote consequences, there may be two or more concurrent and directly cooperative and efficient proximate causes of an injury . . ."
>
> "Clearly, two acts committed directly by the defendant, or by a person for whose conduct he is responsible, which combined to cause an injury to the plaintiff, may each constitute a proximate cause of the injury."

45 C. J., Negligence, Sec. 488, page 925.

> "What are Concurrent Causes? Concurrent causes within the rules above stated are causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either. But where the negligence

> of one consists in a condition merely which is rendered injurious by the subsequent negligence of a third person, the acts of the two persons are not concurrent. So, if two distinct causes are successive and unrelated in operation, they cannot be concurrent; one of them must be the proximate and the other the remote cause, and this applies where one of the unrelated causes is extraordinary and unexpected. The mere fact that the concurrent cause was unforeseen will not relieve from liability for the act of negligence, unless it was so extraordinary and unexpected that it could not have been anticipated." (And cases cited in notes.)

Other decisions of the State of Washington approving the doctrine of concurrent causes are Young v. Smith, 166 Wash. 411, 7 P.(2d) 1; Lindsay v. Elkins, 154 Wash. 588, 283 Pac. 447.

Plaintiff Is Not Guilty of Contributory Negligence

Appellant has assigned error on the Court's refusal to grant its motion for directed verdict and upon the Court's refusal to grant its motion for judgment in its favor and against the plaintiff setting aside the verdict theretofore returned in favor of plaintiff in said cause. One of the grounds for appellant's motion for directed verdict was that the plaintiff, Mrs. Mary Harrington, was guilty of contributory negligence. (Tr. 304)

It is, of course, appellee's contention that said passenger, Mrs. Mary Harrington, did not have to call the porter to have him hang up her hat. She had a perfect right to stand up on this train, particularly in

view of appellant's testimony that the Hiawatha Streamliner was normally a very smooth-running train. It is a well-known fact that this streamliner is advertised widely as being very smooth in its operation. (See appellant's own exhibit entitled *Appendix "A,"* as attached to the back page of appellant's brief.)

Certainly appellant cannot claim that a passenger is required to ring for the porter before said passenger can stand up from his seat while the train is in operation in the event such passenger wishes to go to the dining car or lavatory. If a passenger desires to stand up to hang up his hat there certainly would be no distinction.

The Supreme Court of the State of Washington, in the case entitled

> Lane v. Spokane Falls and Northern Ry. Co., 21 Wash. 119, 57 Pac. 367; 46 L. R. A. 153

held that a passenger, as a matter of law, could not be held guilty of contributory negligence for standing in the aisle. A similar rule is set forth in

> Shearman & Redfield, Vol. 3 at page 1392

> "There is no rule forbidding passengers on a train to change their seats or to move from one car to another, so long as they act prudently in doing so. Therefore, the mere fact that an injury would not have been suffered, had the passenger remained in the seat or car which he first took, is not proof of contributory negligence. Even while a train is in motion such a change may be made, if consistent with the ordinary prudence of prudent man . . . 'Nor can they be required to sit still. The

law, which makes liberal allowance for the natural restlessness of dogs, must surely make equal allowance for the restlessness of the average man. Long train journeys are monotonous and trying, at their best, and active men find it impossible to sit still all the way. No special reason for moving need be assigned. The only question is, whether, under all the circumstances, the act was one natural to a prudent man, exercising his prudence.' "

Also it is stated in

Elliott on Railroads, Vol. 5, page 224

"It is generally a question of fact for the jury to determine, under the circumstances, whether a passenger is guilty of contributory negligence in standing up in a passenger car."

Meeks v. Graysonia N. & A. R. Co. (Ark. 1925) 272 S. W. 360, is also of interest on the question of contributory negligence.

See also 45 C. J. Negligence No. 516.

It may be pointed out that the State of Washington expressly repudiates the doctrine of comparative negligence in the cases of Woolf v. Washington R. R. and Nav. Co., 79 Pac. 997, and Scharf v. Spokane & I. E. Ry. Co., 159 Pac. 797.

Also the Washington Supreme Court has held that plaintiff's contributory negligence to defeat recovery must wholly or partially be the cause of injury.

Richardson & Holland v. Owen,
148 Wash. 583, 269 Pac. 838.

It appears clear that this should dispose of appellant's theory that appellee's contributory negligence is a bar to this action. Under the law of the State of Washington, appellee could not be held guilty of contributory negligence as a matter of law and the jury decided as a matter of fact that there was no contributory negligence of such a nature as to bar the recovery.

CONCLUSION

If the testimony of defendant's witnesses is believed, the jury should, of course, have held for defendant. If plaintiff's testimony is believed, then the jury was entitled to hold for plaintiff as it did.

> Lane v. Spokane Falls and Northern Ry. Co., 21 Wash. 119, 57 Pac. 367.

Plaintiff contends that the court committed no error in its instructions to the jury, that there was sufficient evidence of negligence to go to the jury, and that the verdict and judgment have ample support in fact and law.

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Attorneys for Appellant Appellee

No. 12452

United States
Court of Appeals
for the Ninth Circuit.

SAM GAILBREATH,

Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Northern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendant Sam Gailbreath.

In the District Court of the United States for the Northern District of California, Northern Division

No. 5911

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Plaintiffs,

vs.

SIGNAL OIL COMPANY, SAM GALBREATH, FIRST DOE, SECOND DOE, THIRD DOE, and BLACK COMPANY,

Defendants.

COMPLAINT

First Cause of Action

(The Homestead Fire Insurance Company)

Plaintiff, The Homestead Fire Insurance Company, complains of defendants and for cause of action alleges:

I.

That plaintiff, The Homestead Fire Insurance Company, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of the State of Maryland and a citizen and resident of the State of Maryland, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing, the business of fire insurance in the State of California.

II.

That all of the individual defendants and Black Company, a corporation, are citizens and residents of the State of California and that Signal Oil Company is a corporation and a citizen and resident of the State of California.

III.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000) and that jurisdiction of the action is founded upon diversity of citizenship and the amount in controversy.

IV.

That on or about October 21, 1946, plaintiff issued its fire insurance policy No. 3432 to Herold Lumber Company whereby plaintiff insured it in the sum of $5,000 against loss and damage by fire to its lumber storage and office building in Auburn, California; that on October 31, 1946, the said building, which was of a value in excess of $5,000, was destroyed by fire, and the said insurance policy was in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said insurance policy plaintiff became obligated to pay, and on or about January 31, 1947, did pay to said Herold Lumber Company the sum of $5,000 because of said fire damage sustained by it; and that by reason of such payment plaintiff, The Home-

stead Fire Insurance Company, became subrogated to the rights of said Herold Lumber Company against defendants herein who negligently caused the said fire as hereinafter stated.

V.

That on October 31, 1946, defendants First Doe and Second Doe, who were then acting in the course of their employment as the employees of the other defendants, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in said building as to cause, and they did cause, a fire to start in said building which fire resulted in the destruction of said building.

VI.

That by reason of the premises, plaintiff, The Homestead Fire Insurance Company, has been damaged in the sum of $5,000, no part of which damages has been paid.

VII.

That the names of the defendants sued herein as First Doe, Second Doe and Black Company are fictitious and plaintiff will ask leave to insert the real names of said defendants herein when same shall have been ascertained.

Second Cause of Action

(Sun Insurance Office, Limited)

Plaintiff, Sun Insurance Office, Limited, complains of defendants and for cause of action alleges:

I.

That plaintiff, Sun Insurance Office, Limited, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of England and a citizen and resident of England, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing, the business of fire insurance in the State of California.

II.

That all of the individual defendants and Black Company, a corporation, are citizens and residents of the State of California and that Signal Oil Company is a corporation and a citizen and resident of the State of California.

III.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000) and that jurisdiction of the action is founded upon diversity of citizenship and the amount in controversy.

IV.

That on or about October 1, 1946, plaintiff issued its fire insurance policy No. 569021 to Herold Lumber Company whereby plaintiff insured it in the sum of $7,500 against loss and damage by fire to its lumber storage and office building in Auburn, California; that on October 31, 1946, the said building, which was of a value in excess of $5,000, was destroyed by fire, and the said insurance policy was in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said insurance policy plaintiff became obligated to pay, and on or about February 4, 1947, did pay to said Herold Lumber Company the sum of $4,021.09 because of said fire damage sustained by it; and that by reason of such payment plaintiff, Sun Insurance Office, Limited, became subrogated to the rights of said Herold Lumber Company against defendants herein who negligently caused the said fire as hereinafter stated.

V.

That on October 31, 1946, defendants First Doe and Second Doe, who were then acting in the course of their employment as the employees of the other defendants, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in said building as to cause, and they did cause, a fire to start in said

building which fire resulted in the destruction of said building.

VI.

That by reason of the premises, plaintiff, Sun Insurance Office, Limited, has been damaged in the sum of $4,021.09, no part of which damages has been paid.

VII.

That the names of the defendants sued herein as First Doe, Second Doe and Black Company are fictitious and plaintiff will ask leave to insert the real names of said defendants herein when same shall have been ascertained.

Wherefore, plaintiff, The Homestead Fire Insurance Company, prays judgment against defendants for the sum of Five Thousand Dollars ($5,000), for interest thereon at the rate of seven per cent (7%) per annum from January 31, 1947, and for its costs of suit incurred herein; and plaintiff, Sun Insurance Office, Limited, prays judgment against defendants for the sum of Four Thousand and Twenty-one and 09/100 Dollars ($4,021.09), for interest thereon at the rate of seven per cent (7%) per annum from February 4, 1947, and for its costs of suit incurred herein.

/s/ ARTHUR E. COOLEY,
/s/ LOUIS V. CROWLEY,
/s/ H. ROWAN GAITHER, JR.,
/s/ COOLEY, CROWLEY & GAITHER,
Attorneys for Plaintiffs.

State of California,
City and County of San Francisco—ss.

Arthur E. Cooley, being first duly sworn, deposes and says:

That he is a member of the law firm of Cooley, Crowley & Gaither, attorneys for plaintiffs, The Homestead Fire Insurance Company and Sun Insurance Office, Limited, and has his office in the City and County of San Francisco; that neither of said plaintiffs has an officer within the said City and County who can verify the within and foregoing Complaint, and for that reason affiant makes this verification for and on behalf of said plaintiffs. He has read said Complaint and knows the contents thereof; the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to such matters he believes it to be true.

/s/ ARTHUR E. COOLEY.

Subscribed and sworn to before me this 24th day of October, 1947.

[Seal] /s/ DOROTHY H. McLENNAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 25, 1947.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now defendant Sam Galbreath and for his answer to the alleged cause of action of the Homestead Fire Insurance Company set forth in the complaint of plaintiffs on file in the above entitled action, admits, denies and alleges as follows:

I.

Answering Paragraphs I and IV of said alleged cause of action, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraphs I and IV of said alleged cause of action.

II.

Answering Paragraph V of said alleged cause of action, this answering defendant denies each and every, all and singular, the allegations contained in said Paragraph V.

III.

Answering Paragraph VI of said alleged cause of action, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph VI.

As And For His Answer To The Alleged Cause

Of Action Of The Sun Insurance Office, Limited, Set Forth In Said Complaint, this answering defendant admits, denies and alleges as follows:

I.

Answering Paragraphs I and IV of said alleged cause of action, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs.

II.

Answering Paragraph V of said alleged cause of action, this answering defendant denies each and every, all and singular, the allegations contained in said Paragraph V.

III.

Answering Paragraph VI of said alleged cause of action, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph VI.

Wherefore, this answering defendant prays that plaintiffs take nothing by reason of their said action, and further prays that said action may be dismissed with this answering defendant recovering his costs of suit incurred herein.

EARL D. DESMOND,
E. VAYNE MILLER,
K. D. ROBINSON,
Attorneys for Defendant
Sam Gailbreath.

State of California,
County of Sacramento—ss.

Sam Gailbreath, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the above and foregoing Answer To Complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to such matters, he believes it to be true.

/s/ SAM GAILBREATH.

Subscribed and sworn to before me this 6th day of February, 1948.

[Seal] /s/ C. E. DUNLAP,
Notary Public in and for the County of Sacramento, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 6, 1948.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Now comes the plaintiff Sun Insurance Office, Limited and by permission of the above-entitled Court first had files this, an Amendment to Paragraph IV of the Second Alleged Cause of Action

of said Complaint filed herein, by substituting the following, to be numbered Paragraph IV, to wit:

That on or about October 1, 1946, plaintiff Sun Insurance Office, Limited, issued its fire insurance policy numbered 569021 to Herold Lumber Company whereby said plaintiff insured Herold Lumber Company in the sum of $7,500.00 against loss and damage by fire to its stock on its premises at its lumber storage and office building at Folsom Road near the Texas Oil Company spur, Auburn, California; that on October 31, 1946, said stock, which was of a value in excess of $4,021.09, was destroyed by fire and said insurance policy was in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said insurance policy plaintiff Sun Insurance Office, Limited, became obligated to pay and on or about January 4, 1947, did pay to said Herold Lumber Company the sum of $4,021.09 because of said fire damage sustained by it, and that by reason of such payment plaintiff Sun Insurance Office, Limited, became subrogated to the rights of said Herold Lumber Company to the extent of $4,021.09 against defendants herein, who negligently caused the said fire as hereinafter stated.

Dated: April 13, 1929.

COOLEY, CROWLEY &
GAITHER,

By /s/ AUGUSTUS CASTRO,
Attorneys for plaintiff Sun
Insurance Office, Limited.

State of California,
City and County of San Francisco—ss.

Augustus Castro, being sworn, deposes and says:

That he is an attorney at law duly licensed to practice in the courts of the State of California, a member of the firm of Cooley, Crowley & Gaither, attorneys for the plaintiff Sun Insurance Office, Limited, named in the above entitled action; that as such attorney he has and maintains his offices in the City and County of San Francisco, State of California; that said plaintiff resides out of and is absent from the said city and county; that for this reason he makes this verification for and on behalf of said plaintiff; that he has read the foregoing Amendment to Complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

/s/ AUGUSTUS CASTRO.

Subscribed and sworn to before me this 13th day of April, 1949.

[Seal] /s/ ANN J. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Sept. 28, 1952.

Affidavit of service by mail attached.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on regularly for trial on the 11th day of May, 1948, and the 18th day of April, 1949, and evidence both oral and documentary having been introduced, and said matter having been fully argued and submitted for the decision of the above entitled Court, after due deliberation the Court makes its

Findings of Fact

I.

It is true that at all times hereinafter mentioned:

(a) That plaintiff, The Homestead Fire Insurance Company, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of the State of Maryland and a citizen and resident of the State of Maryland, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing, the business of fire insurance in the State of California.

(b) That plaintiff Sun Insurance Office, Limited, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of England and a citizen and resident of England, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing,

the business of fire insurance in the State of California.

(c) That Cerino Lemos and Harry Gregory were the agents, servants and employees of the defendant Sam Galbreath and were acting within the course of their employment as such.

(d) That the lumber storage and office building hereinafter mentioned was of a value in excess of $5,000.00.

(e) That the destroyed part of the stock in trade of lumber hereinafter mentioned was of a value in excess of $4,201.09.

II.

It is true that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 and that jurisdiction of the action is founded upon diversity of citizenship and the amount in controversy.

III.

It is true that on or about the 21st day of October, 1946, plaintiff The Homestead Fire Insurance Company issued its fire policy No. 3432 to Herold Lumber Company whereby plaintiff, the Homestead Fire Insurance Company, insured Herold Lumber Company in the sum of $5,000.00 against loss and damage by fire to its lumber storage and office building in Auburn, California.

IV.

It is true that on or about October 10, 1946, plaintiff Sun Insurance Office, Limited, issued its fire insurance policy No. 569021 to Herold Lumber Company whereby plaintiff Sun Insurance Office, Limited, insured Herold Lumber Company in the sum of $7,500.00 against loss and damage by fire to its stock of lumber situate on the premises of Herold Lumber Company.

V.

It is true that on October 31, 1946, said building and the following part of said stock, to wit:

				Loss and Damage
412 Pc.	1x12x16 #1 Com. PP S45	6,592′	$100.50	$ 662.50
1628	2x4x—	17,363	71.75	1245.80
514	2x6x	8,224	71.25	585.96
632	1x16x16 #1 Com PP S45-V Rustic	8,426	96.00	808.90
542	1x4x V.G. D Select Fig. D.F.	2,890	106.75	308.50
184	2x8x16 #1 D.F. R.D.	3,925	69.25	271.81
35	2x12x16	1,120	70.50	78.96
26	4x6x16	832	70.50	58.66
				4021.09

were destroyed by fire and each of the said insurance policies were in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said policies and that by reason of said policy No. 3432 plaintiff The Homestead Fire Insurance Company became obligated to pay and on or about the 31st day of Jnauary,

1947, did pay to said Herold Lumber Company the sum of $5,000.00 because of said fire damage sustained by said Herold Lumber Company on account of such destruction of said building, and that by reason of such payment plaintiff The Homestead Fire Insurance Company became subrogated to the rights of said Herold Lumber Company to the extent of $5,000.00 against said defendant herein who negligently caused said fire as hereinafter stated; and that by reason of said fire pursuant to the terms of said policy No. 569021 plaintiff Sun Insurance Office, Limited, became obligated to pay and on or about the 4th day of February, 1947, did pay to said Herold Lumber Company the sum of $4,021.09 because of said fire damage sustained by Herold Lumber Company on account of such destruction of said stock and that by reason of such payment, said plaintiff Sun Insurance Office, Limited, became subrogated to the rights of said Herold Lumber Company to the extent of $4,021.09 against said defendant herein who negligently caused said fire as hereinafter stated.

VI.

It is true that on October 31, 1946, said Cerino Lemos and Harry Gregory who were then acting in the course of their employment as the employees of said defendant Sam Galbreath, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in

said building as to cause, and they did cause, a fire to start in said building which fire resulted in the destruction of said building and part of stock of lumber.

VII.

It is true that by reason of the premises, plaintiff, The Homestead Fire Insurance Company, has been damaged in the sum of $5,000.00, no part of which damage has been paid.

VIII.

It is true that by reason of the premises, plaintiff, Sun Insurance Office, Ltd., has been damaged in the sum of $4,021.09, no part of which damage has been paid.

From the above findings of fact, the Court makes its

Conclusions of Law

I.

That plaintiff, The Homestead Fire Insurance Company, is entitled to judgment against the defendant Sam Galbreath for the sum of $5,000.00, together with interest thereon at the rate of 7% per annum from the 31st day of January, 1947, to and including the rendition of judgment herein.

II.

That the plaintiff, Sun Insurance Office, Ltd., is entitled to judgment against the defendant Sam

Galbreath for the sum of $4,021.09, together with interest thereon at the rate of 7% per annum from the 4th day of February, 1947, to and including the rendition of judgment herein.

It Is Therefore Ordered, that a judgment be entered in favor of the plaintiff, The Homestead Fire Insurance Company, and against the defendant Sam Galbreath for $5,000.00, together with interest thereon at the rate of 7% per annum from the 31st day of January, 1947, to and including the rendition of judgment herein, and in favor of the plaintiff, Sun Insurance Office, Ltd., and against the defendant Sam Galbreath for $4,021.09, together with interest thereon at the rate of 7% per annum from the 4th day of February, 1947, to and including the rendition of judgment herein, together with their costs of suit herein.

Dated: May 4, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed April 27, 1949.

In the District Court of the United States for the Northern District of California, Northern Division

No. 5911

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Plaintiffs,

vs.

SIGNAL OIL COMPANY, SAM GALBREATH, FIRST DOE, SECOND DOE, THIRD DOE and BLACK COMPANY,

Defendants.

JUDGMENT

The above cause having been tried and submitted and the Court having made, filed and caused to be entered herein its Findings of Fact and Conclusions of Law and ordered judgment in favor of plaintiffs,

Wherefore, by Reason of the Premises, It Is Ordered, Adjudged and Decreed:

1. That the plaintiff, the Homestead Fire Insurance Company, recover from the defendant Sam Galbreath the sum of $5,787.50 damages, together with its costs of suit herein taxed at the sum of $74.35.

2. That the plaintiff, Sun Insurance Office, Limited, recover from the defendant Sam Galbreath the

sum of $4,654.41 damages, together with its costs of suit herein taxed at the sum of $122.54.

Dated: May 10th, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

Entered in Civil Docket May 10, 1949.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Sam Galbreath, Defendant in the above-entitled case, hereby appeals from the judgment entered herein on the 10th day of May, 1949.

Dated: October 24, 1949.

EARL D. DESMOND,
E. VAYNE MILLER,
K. D. ROBINSON,
Attorneys for Defendant,
Sam Galbreath.

[Endorsed]: Filed Oct. 24, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

A. A transcription by the reporter of all the testimony taken at the trial which was stenographically reported.

B. A copy of the Complaint and Amended Complaint.

C. A copy of the Answer.

D. Findings of Fact and Conclusions of Law.

E. Notice of Motion for new trial.

F. Decision, Judgment and Opinion of Court.

Respectfully submitted,

/s/ EARL D. DESMOND,
/s/ E. VAYNE MILLER,
/s/ K. D. ROBINSON,
Attorneys for Defendant
Sam Galbreath.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The Court committed error in finding that the fire was proximately caused by the stove.

2. The doctrine of Res Ipsa Loquitur cannot be applied to the instant cause.

3. Plaintiffs did not establish that the instrumentality complained of, the stove and its accessories were under the exclusive control of the defendants.

4. As a general rule the destruction of property by fire does not raise the presumption of negligence.

5. A stove is not an inherently dangerous article and the "Res Ipsa Loquitur" doctrine is not applicable.

Respectfully submitted,
/s/ EARL D. DESMOND,
/s/ E. VAYNE MILLER,
/s/ K. D. ROBINSON,
Attorneys for Defendant
Sam Galbreath.

[Endorsed]: Filed Dec. 1, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE RECORD ON APPEAL

Good cause appearing therefore, It Is Ordered that Defendant Sam Galbreath may have to and including the 31st day of December, 1949, in which to prepare record on appeal herein.

Dated: December 2, 1949.

/s/ DAL M. LEMMON,
Judge of the United States
District Court.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE RECORD ON APPEAL

Good cause appearing therefor, It Is Ordered that Defendant Sam Galbreath may have to and including the 16th day of January, 1950, in which to prepare record on appeal herein.

Dated: December 29th, 1949.

. /s/ DAL M. LEMMON,
Judge of the United States
District Court.

[Endorsed]: Filed Dec. 28, 1949.

In the District Court of the United States for the Northern District of California, Northern Division

No. 5911

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Plaintiffs,

vs.

SIGNAL OIL COMPANY, SAM GALBREATH, FIRST DOE, SECOND DOE, THIRD DOE, and BLACK COMPANY,

Defendants.

Before: Hon. Dal M. Lemmon,
Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiffs:

AUGUSTUS CASTRO, ESQ.,
COOLEY, CROWLEY & GAITHER,
333 Montgomery Street,
San Francisco 4, Calif.

For Defendant Sam Galbreath:

EARL D. DESMOND, ESQ.,
E. VAYNE MILLER, ESQ.,
K. D. ROBINSON, ESQ.,
307-11 Capital National Bank Bldg.,
Sacramento 14, Calif.

Tuesday, May 11, 1948—10:00 o'Clock A.M.

The Clerk: Homestead Fire Insurance Company versus Signal Oil Company.

Mr. Castro: Ready for the plaintiffs.

Mr. Desmond: Ready.

Mr. Castro: May I finish putting on this diagram, your Honor? It will be very short.

The Court: You may.

Mr. Castro: Call Mr. Roy Albers.

The Court: May I ask counsel for the plaintiffs what is the situation with relation to the Signal Oil Company?

Mr. Castro: The complaint against the Signal Oil Company has been dismissed without prejudice.

The Court: The form of the dismissal is that agreement?

The Clerk: It isn't signed by you, sir.

Mr. Castro: It is not signed; however, I will sign it.

ROY ALBERS

Called by the plaintiffs, sworn.

The Clerk: May we have your name, sir?

A. Roy Albers.

Direct Examination

By Mr. Castro:

Q. What is your name? [2*]

A. Roy Albers.

Q. Where do you live? A. Sonora.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Roy Albers.)

Q. How long have you lived there?

A. Forty years.

Q. What is your occupation? A. Laborer.

Q. In October of 1946, were you employed by Herold Lumber Company? A. Yes, sir.

Q. Where? A. Auburn.

Q. And at that time, who was your superior employee? A. Charley Little.

Q. And on the 31st day of October, 1946, were you acquainted with Sam Galbreath?

A. I didn't get that.

Mr. Castro: The witness is hard of hearing, your Honor. I am sorry; I will try to raise my voice.

Q. Were you acquainted with Sam Galbreath?

A. Yes, sir.

Q. And how long had you known Mr. Galbreath?

A. Oh, I would say about six months.

Q. Did you go to Mr. Galbreath's place of business on October 31, 1946, and pick up a stove? [3]

A. I did.

Q. Do you know what type of stove that was?

A. I couldn't say the name, but it is an oil stove.

Q. Who sent you for it?

A. Charley Little.

Q. And whom did you see at Galbreath's plant where you picked it up?

A. Just the son and the father.

Q. Do you know the son's name?

A. No, I don't.

(Testimony of Roy Albers.)

Q. Was that stove crated or uncrated?

A. I didn't get it.

Q. Was the stove crated?

The Court: Boxed in a crate or not?

The Witness: Yes, it was in a crate.

Q. (By Mr. Castro): What did you do with the stove?

A. Well, I put it on a pickup, took it over to the office and unloaded it.

Q. Whose office did you take it to?

A. To the plant office, Auburn.

Q. At the Herold Lumber Company?

A. Yes, sir.

Q. What did you do with the stove when you unloaded it? A. Just left it sit there.

Q. Did you uncrate or unbox it? [4]

A. No, sir.

Q. Did you take the crate off?

A. Just the top of it to look at it.

Q. And where did you put the stove in the lumber yard? A. In the office.

Q. Now (indicating) this rectangle represents the rectangular building of Herold Lumber Company in Auburn.

Mr. Desmond: Well, I object to that as a conclusion. There is no foundation laid.

Mr. Castro: All right, we will strike it then, counsel.

Q. Now, where in the office did you put the stove? A. Well, right in by the counter.

(Testimony of Roy Albers.)

Q. Did you do anything else with the stove?

A. No, I didn't.

Q. Later that day, did you see anybody from Sam Galbreath's place of business at the lumber office? A. No, sir.

Q. Did you see any truck with the Galbreath sign on it at the lumber company?

A. On the following day.

Q. What? A. On the following day.

Q. On the day after the delivery?

A. Yes, sir. [5]

Q. And will you describe the truck that you saw there? A. I think I could.

Q. Go ahead.

The Court: Describe it.

The Witness: Just a pickup with the equipment to maintain the stove, and one thing and another.

Q. (By Mr. Castro): And did it have any name on it?

A. I think it did; the Signal Oil Company.

Q. Did it have any other name?

A. Sam Galbreath's name on it.

Q. Now did you do anything other than uncrate the top of that stove? A. No, I did not.

Mr. Castro: You may cross-examine.

Cross-Examination

By Mr. Desmond:

Q. You state, Mr. Albers, that you got the stove in Mr. Galbreath's place of business?

A. I can't hear you.

(Testimony of Roy Albers.)

Q. You state that you got this stove, or this stove that was in a crate, at Mr. Galbreath's place of business? A. I did.

Q. What day was that?

A. Well, I couldn't say the date.

Q. Do you remember what day of the week it was? A. No. [6]

Q. Were you working for the Herold Lumber Company at the time? A. Yes.

Q. What were your duties?

A. I was a leveller operator.

Q. The leveller operator. Would you explain that?

A. Well, it's a machine that picks up lumber.

Q. How long had you been working there?

A. Oh, just a short while.

Q. I see. Now, who sent you after this stove?

A. Charley Little.

Q. What did he tell you?

A. He says, "Go over and pick up the stove up and bring it over."

Q. Did he tell you what kind of stove?

A. An oil stove.

Q. Did he give you any other instructions?

A. That's all.

Q. And you are sure you went over in a pickup truck and got the stove? A. It was my truck.

Q. Your own personal truck? A. Yes.

Q. It didn't belong to the lumber company?

A. No. [7]

(Testimony of Roy Albers.)

Q. And where did you put the stove?

A. Inside the office behind the counter.

Q. Inside of the office of the lumber company behind the counter, is that correct? A. Yes.

Q. And did you do anything further with it?

A. No.

Q. And who delivered the stove to you?

A. Who delivered it to me?

Q. Yes.

A. Sam Galbreath.

Q. Did you have any conversation at that time about installing it or anything? A. No.

Q. Didn't talk about installing it?

A. Oh, I just asked him about it, just a few questions.

Q. What did you ask him?

A. What kind of stove it was and how good it was. I figured on getting one myself.

Q. You later bought a stove, did you?

A. Yes.

Q. Did you ask Mr. Galbreath how to install it, how to connect it up or anything? A. No, sir.

Q. Did you ask him how it burnt? [8]

A. No.

Q. Didn't you ask him how to light it or anything? A. No.

Q. You had no conversation at all other than Mr. Little sent you for a stove? A. No.

Q. Now, did you get any stove pipe with the stove? A. No, sir.

(Testimony of Roy Albers.)

Q. Did you get any connections for the stove?

A. No, sir; just the stove.

Q. Just the stove in a crate?

A. That's right.

Q. I see. Now, you say you saw a truck with the Signal Oil Company's sign and Mr. Galbreath's name on it the following day?

A. How was it?

Q. I say you said—you testified that you saw a truck with the Signal Oil Company's sign on it, and Mr. Galbreath's name on it, the following day, is that right? A. Yes.

Q. Where did you see that truck?

A. I am pretty sure it was sitting out in front.

Q. In front of where? A. Of the office.

Q. What office? [9]

A. Herold Lumber Company.

Q. Now, would you tell us, please, where the Herold Lumber Company's office was?

A. Where it was located?

Q. Yes.

A. Outskirts of the Sacramento Highway.

Q. Well, what do you mean "the Sacramento Highway"? A. Street.

Q. On Sacramento Street?

A. Yes, in Auburn.

Q. Is that the main highway between Sacramento and Auburn? A. No.

Q. Tell the Court what highway.

A. Just the back road from here to Folsom.

(Testimony of Roy Albers.)

Q. And how far back is it from the—the building, how far is the building back from the highway?

A. Oh, I would say about fifty feet.

Q. And what sort of a building was it, wood or metal? A. Wood.

Q. Now, with reference to the lumber company building you have described, where is Mr. Galbreath's plant?

A. Well, I would say that's about 150 yards away from there.

Q. In what direction?

A. That would be south.

Q. Now, that was the day after you got the stove, you are [10] positive of that?

A. No, I ain't positive of anything.

Mr. Desmond: I see. That's all.

Redirect Examination

By Mr. Castro:

Q. Did a fire take place at the lumber yard while the Galbreath truck was there?

Mr. Desmond: Objected to, your Honor, as assuming something not in evidence.

The Court: Overruled; you may answer.

The Witness: Yes.

Mr. Castro: No further questions.

The Court: Any further questions?

Recross-Examination

By Mr. Desmond:

Q. You are positive this truck you saw had the name "Galbreath" on it? A. I was.

(Testimony of Roy Albers.)

Q. Where was it on the truck?

A. I am pretty sure it was on the door.

Q. What was the name? Was there any initials or anything? A. No; it's hard to say.

Q. Do you know whether or not there was a name on it? A. I am pretty sure there was.

Q. How sure are you?

A. I am pretty sure.

Q. You are sure there was no name on there except Signal [11] Oil Company?

A. Sam Galbreath's name.

Q. You are sure of that? A. Yes.

Q. Now, you mention a fire. Did that fire occur the same day that you took the stove over?

A. No.

Q. You are sure of that?

A. I am sure of that.

The Court: Was it the next day?

A. That, I couldn't say.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Castro: Mr. Little.

CHARLES W. LITTLE

Called for the plaintiffs, sworn.

The Clerk: And your full name, sir?

A. Charles W. Little.

The Clerk: Will you take the witness stand, please?

(Testimony of Charles W. Little.)

Direct Examination

By Mr. Castro:

Q. Will you state your name?

A. Charles W. Little.

Q. Where do you reside?

A. Forest Hill. [12]

Q. How long have you lived there?

A. Oh, off and on for about two and a half years.

Q. And in October of 1946, where were you living? A. Auburn.

Q. That is in what county?

A. Placer County.

Q. And State of California? A. Right.

Q. And at that time, in whose employment were you? A. Herold Lumber Company.

Q. And where were you employed?

A. At the Herold Lumber Company, on Sacramento Street.

Q. In what city? A. Auburn.

Q. And was that located in the city itself or is it outside the city? A. On the outskirts.

Q. Now, what did the lumber company consist of so far as actual physical set-up at its place of business?

A. Well, it consisted of approximately two acres of ground, and was in the course of construction of a——

Q. It was a new plant there? A. Right.

(Testimony of Charles W. Little.)

Q. Was a building erected? A. Yes. [13]

Q. What type of building was it?

A. Lumber shed. On that lumber shed was two rooms built into it.

Q. And do you know the approximate length of that building? A. 32 by 64, I believe.

Q. 32 feet would be what, the width?

A. That's right.

Q. And 64 feet would be the length?

A. That's right.

Q. Now where were these offices in that building?

A. In the southwest corner.

Q. Southwest. And can you give me the approximate size of the office?

A. 16 by 16 each, office and storeroom.

Q. Now, indicate on the blackboard here, if you will with the chalk, the location of the office in that building.

A. (Witness goes to blackboard and indicates.)

Q. You have marked "X,"——

A. That's right.

Q. (Continuing): ——as the office. That would be the southwest corner? A. That's right.

Q. And where is the Sacramento Street that you have referred to? A. We will mark—— [14]

Q. We will mark there "Sacramento." Now, what was that building constructed of?

A. Well, it is constructed of fir timbers and siding on the office part of it, and on the ends——

(Testimony of Charles W. Little.)

Q. Now, in that office, were there any windows?

A. Yes, there were four.

Q. Would you indicate the windows?

A. (Witness indicates.)

Q. Now, you have just put in two windows, I believe, on the front side of the building, and also two on——

A. On the west—or the south side.

Q. That would be the south side; and the front side is what direction? A. West.

Mr. Desmond: May I suggest to the counsel, would he have the witness indicate the various directions: north, east, south and west?

Q. (By Mr. Castro): Now, did that office have any doors?

A. It had a door here and a door here. (Indicating.)

Q. Would you draw the doors in?

A. (The witness draws on blackboard.)

Q. Now did the office have anything in it besides the four walls and the floor and the ceiling?

A. The counter and two desks and a telephone.

Q. Where was the counter located? [15]

A. Well, this is a good illustration. (Indicating.)

Q. You have indicated a rectangle. Would you mark that as the counter?

A. (Witness makes mark on blackboard.)

Q. What is the approximate length of that counter? A. Thirteen feet.

(Testimony of Charles W. Little.)

Q. And about how far was it set from the south side of the building? A. About three feet.

Q. About how wide was the counter?

A. I think it was twenty-two inches wide.

Q. And its approximate height?

A. About forty inches.

Q. Now, where were the desks that you have referred to?

A. They were over on this side. (Indicating.)

Q. You have drawn two rectangles. Would you indicate the word "desks" on them?

A. (Witness indicates.)

Q. Now, are you acquainted with Sam Galbreath? A. Yes.

Q. How long have you known him?

A. About ten years.

Q. And during that time have you done any business with him? A. Oil—stove——

Q. And during the month of October, 1946, did you have any conversation with him concerning a heating system or a heating unit for that office? [16]

A. I did.

Q. Where did that conversation take place?

A. In his office.

Q. Who was present?

A. Well, I don't remember if there was anybody present; probably some one of his employees may have been in and out.

Q. Whom did you talk to at that time?

A. Sam.

(Testimony of Charles W. Little.)

Q. What was your discussion?

Mr. Desmond: Will you fix the date?

Q. (By Mr. Castro): Can you fix that date with relation to when you had a fire at the lumber company? A. Previous.

Q. About how long previous?

A. It may have been a week.

Q. And what was that conversation?

A. To see whether or not he could furnish me a stove.

Q. And was he able to furnish a stove?

A. He said he could, yes.

Q. And, did he give you any description or name of the stove?

A. Well, no, any more than we discussed the size of the stove necessary to heat the area that was to be heated.

Q. And what size of stove was it to be?

A. That I can't tell.

Q. Now was there any discussion concerning the installation [17] of the stove?

A. No more than he had the necessary tubing, pipe and fittings and would install it.

Q. Now, did you later have a stove picked up from Galbreath's? A. Yes.

Q. Did you have the copy of the delivery tag, whatever it is, Mr. Little; did you have a sales tag, I believe Number B-42277——

Mr. Castro: At this time, we would offer in evi-

(Testimony of Charles W. Little.)

dence, your Honor, a piece of paper on which bears the name Sam Galbreath. It bears a serial number B-42288, Auburn, California, 10-31-46, sold to Herold Lumber Company, One Customaire—spelled (Spelling) a-i-r-e—$55.50 CHG; sales tax $1.38; total $56.88. I believe the initials are D. G. We will offer the document in evidence as Plaintiffs' Exhibit first in order, your Honor.

The Court: Received.

The Clerk: Plaintiffs' Exhibit 1.

(The document referred to was marked Plaintiffs' Exhibit 1 in Evidence.)

Mr. Castro: I show you Plaintiffs' Exhibit 1, referring to a Customaire Heater. Was that the heater which was delivered, which was brought to the Herold Lumber Company?

Mr. Desmond: Just a moment, we are going to object. There is no foundation laid at this time to show any [18] connection by this witness with this particular tag. Now he can testify what was brought there, your Honor, but he certainly can't draw a conclusion from this sales invoice.

Q. (By Mr. Castro): All right, did you pay for that sales invoice? A. I did.

Mr. Castro: I think that is the connection, your Honor.

Q. (By the Court): Where did you first see it?

A. The invoice or the stove?

Q. Yes.

(Testimony of Charles W. Little.)

A. The invoice first I saw it was when the bill was sent to the Herold Lumber Company.

Q. How was it sent? A. The bill, by mail.

Q. You received it through the mail?

A. That's right.

Mr. Desmond: If your Honor please, I might clarify that point. I believe the witness said he received the bill, not the invoice.

Q. (By the Court): You mean you received the invoice that you have in your hand in the mail?

A. No, we didn't receive that.

Q. Where did you receive that? That was my question.

A. I believe the Herold Lumber Company has a copy of this—or I mean a yellow slip which is generally given on delivery. [19]

Q. You mean by that that you received a yellow slip which is a copy of the exhibit you have in your hand?

A. Well, I couldn't swear to it that we did.

Q. What became of that slip?

A. That I couldn't say.

Q. Did you destroy it in the fire?

A. Well, it might have been.

Mr. Desmond: No, your Honor, we have a note in the file that the original was sent to the plaintiffs in this action.

The Court: What is that?

Mr. Desmond: We have a note in the file that

(Testimony of Charles W. Little.)

the original was sent to the plaintiffs in the action. I have a statement here——

Mr. Castro: You can't tell by the statement.

Mr. Desmond: Have you completed with that statement?

Mr. Castro: Just a moment.

The Court: Can't you speed it up?

Mr. Desmond: Yes, I would like to.

Mr. Castro: At this time, we offer in evidence a document entitled Statement, Sam Galbreath Petroleum Products, 'Phone Auburn 30R, 124 Finley Street.

The Court: Lay the foundation. Where did it come from?

Q. (By Mr. Castro): Would you examine this document bearing date October 31, 1946? [20]

A. (Witness examines document.)

Q. Did you receive that?

A. Well,—I probably did.

Q. And at the time it was received, were any invoices attached to it as indicated?

A. That I can't tell you.

Q. Do you know whether or not——

A. We had a bookkeeper take care of the mail.

Q. Do you know whether or not invoice referred to as dated October 27, '42, number 42277, was actually attached to that statement?

Mr. Desmond: Now, just a moment, Mr. Little, I want to object.

(Testimony of Charles W. Little.)

The Court: The witness says he probably received it.

Mr. Castro: We will mark it for identification.

The Clerk: Plaintiffs' 2 for identification.

(The document referred to was marked Plaintiffs' 2 for identification.)

Q. (By Mr. Castro): Now, what was your official capacity at the Herold Lumber Company?

A. Yard manager.

Q. And you had been yard manager for approximately how long? A. Well, three months.

Q. You may take the stand.

(The witness resumed the witness stand.)

Q. Were you acquainted with Roy Albers?

A. Yes.

Q. And how long have you known Mr. Albers?

A. Well, about two months and a half.

Q. At what time was it that you had known him for about two and a half months?

A. Right at that time, previous to the 31st of October.

Q. Now, did you send him for a heater?

A. Yes.

Q. And, did he pick up a heater and bring it to your place of business? A. Yes.

Q. And do you know what kind of a heater that was?

A. I couldn't tell you the name. It was an oil heater.

(Testimony of Charles W. Little.)

Q. And do you know where that oil heater was placed in your premises?

A. It was placed inside the office.

Q. Where about in the office?

A. That I couldn't say.

Q. (By the Court): Did you see it there?

A. I saw it delivered, that's all.

Q. After it was delivered, didn't you see it in the office?

A. I saw it in there but it was just in back of the counter.

Q. (By Mr. Castro): Now, did somebody come there after the heater was delivered to install it?

A. Yes.

Q. And can you identify who came there?

A. Well, the person that came over there first I had never seen before.

Q. Is he present in the courtroom this morning?

A. He is not.

Q. He is what? A. He is not.

Q. All right, did someone else come over?

A. Later, yes.

Q. How did the first man come over?

A. Came over in a pick-up.

Q. And did that pick-up have any identification on it? A. Not that I know of.

Q. And who came over later?

A. One of Mr. Galbreath's——

Mr. Desmond: I am going to object.

(Testimony of Charles W. Little.)

Q. (By Mr. Castro): What was the name of the man who came over later?

A. Well, I know him as Harry.

Q. (By the Court): As who? A. Harry.

Q. (By Mr. Castro): And is he present in the courtroom today? A. Yes. [23]

Q. Would you point him out?

A. He is on the bench directly in back of Mr. Galbreath.

Mr. Castro (To man referred to): Would you stand up for the purpose of the record?

(The person spoken to arose and gave his name as Harry Gregory.)

Q. (By Mr. Castro): Now, the first man that came there, did you later see him with Mr. Gregory?

A. Yes, I saw him around there. I was mostly out in the yard. I was very busy checking in and sending out loads of lumber.

Q. He and Mr. Gregory were together at various times? A. Well, I could assume that they were.

Mr. Desmond: I am going to ask, please, that the answer go out.

Mr. Castro: Certainly it may go out.

The Court: No need to flare up about it; just make your objection.

Q. (By Mr. Castro): Did you see them together? A. Well, I can't say that I did.

Q. Did you see how Mr. Gregory came to the Herold Lumber Company?

(Testimony of Charles W. Little.)

A. I didn't see when he came.

Q. Now while he was there did you see any vehicle there?

A. Their pickup that I speak of was there all afternoon—— [24]

Q. Now——

A. (Continuing): ——up until the time that I left that I know of.

Q. Did you see Mr. Gregory in and out of the Herold Lumber Company office?

A. I saw him a couple of times. I wasn't near the office, however.

Q. But did you see him going in and out of the office? A. Yes.

Q. Now, did a fire take place on October 31, 1946, at the Herold Lumber Company office?

A. Yes.

Q. Were you present at the time of the fire?

A. No, not when it started.

Q. Where were you? A. I was at home.

Q. And what were you doing?

A. I had just gotten out of the bath tub.

Q. And with relation to a conversation, were you having a conversation with anybody?

Mr. Desmond: To which we object.

The Court: Overruled.

Mr. Castro: I am not asking for the conversation.

Q. You may answer. A. Yes. [25]

Q. Who with? A. My brother.

Q. What is his name? A. J. E. Little.

(Testimony of Charles W. Little.)

Q. And how were you talking to him?

A. Telephone.

Q. Did you furnish any material for the installation of that oil heater? A. No.

Q. Did you get a bill for the material used in the installation of an oil heater? A. Yes.

Q. From whom? A. From Mr. Galbreath.

Q. Do you have a copy of it?

A. (Witness hands document to Mr. Castro.)

Mr. Castro: At this time, we offer in evidence a statement: Sam Galbreath Petroleum Products, Serial No. B-10543, Auburn, California, 10-31-1946; Sold to Herold Lumber Company, Copper Tubing, 23 feet, price 15, total 3.45; Fittings, 3, price 40, total 1.20; Value 1.00; Bushings "CHG" 2, 20, total .40; Drum, $4.00; Stove Oil, 38, price 10, total $3.80; Sales Tax .35; Total $14.20; Drivers initials "C. L."

The Court: No foundation has been laid for its introduction. [26]

Mr. Desmond: We ask that these be produced; and I don't think counsel disputes the fact, your Honor.

The Court: It should be connected up either by testimony or by stipulation with counsel. No use to put it in evidence without any foundation for it.

Mr. Castro: Do you have any objection?

Mr. Desmond: We are going to make the objection at this time, your Honor, that there has been no identification made. If he wants to introduce it

(Testimony of Charles W. Little.)

for identification, that is another matter.

The Court: Sustained.

Q. (By the Court): You said you got a copy of that or you got some sort of statement is that it?

A. Well we always customarily received one.

Q. Do you have any independent recollection of receiving it?

A. No, I haven't any more than I do know that I had an itemized statement of the fittings that were used.

Q. (By Mr. Castro): Would you examine this document? (Handing document to witness.)

Mr. Desmond: May we see it, counsel?

Mr. Castro: Yes. (Handing document to Mr. Desmond.) The handwriting on there is mine, indicating the first exhibit offered in evidence.

Q. I show you a document on the letterhead of the Herold [27] Lumber Company, Inc. Are you familiar with that paper?

A. It is a copy of the itemized statement.

Q. (By the Court): Did you ever see it before?

A. Well, I probably saw it when I paid the bill, when I signed the check.

Q. Do you know that you received it or do you not know that? A. Received the statement?

Q. Yes.

A. Yes, I know that we received the statement. Otherwise I wouldn't have signed the check paying the bill.

Q. Have you got a notation there indicating it is paid? A. No, this is a copy.

(Testimony of Charles W. Little.)

(Discussion was had off the record about the document referred to.)

Mr. Desmond: If your Honor please——

The Court: Any statement unsworn by counsel won't be accepted by me, so you don't need to make any objections.

Mr. Desmond: I am going to object to the document itself on the ground that it is purely self-serving. It is the document that the plaintiffs prepared in their own office.

Mr. Castro: It is the identical duplicate of plaintiffs' Exhibit No. 1 in this case, and plaintiffs' exhibit which it was going to offer next covering the fittings of the stove. [28]

The Court: If you can prove the foundation as having come from the defendant, I will receive it; but if this is a statement prepared by this witness, I will not receive it unless you can prove the loss of the original and prove that is a copy.

Mr. Castro: I will ask that this document, Serial Number B-10543 be marked for identification.

The Clerk: Three for identification.

(The document referred to was marked Plaintiffs' No. 3 for Identification.)

Mr. Castro: As I understand it, your Honor, at the pre-trial conference there was a stipulation that both these invoices, Plaintiffs' Exhibit No. 1 and

(Testimony of Charles W. Little.)

Plaintiffs' Exhibit No. 3 for Identification had been paid by the Herold Lumber Company.

Mr. Desmond: Plus another invoice, your Honor, for another charge entirely which has nothing to do whatever with the matter now before the Court.

Mr. Castro: That is correct.

Mr. Desmond: And we offer our objection that the check which counsel attempted to put in at that time showing a voucher attached on it was entirely self-serving and not a statement of the actual facts.

Mr. Castro: The check was withdrawn except as to the amount actually paid by the Herold Lumber Company to [29] Galbreath's organization.

The Court: Was it a cancelled check?

Mr. Castro: Well, your Honor, it is the carbon copy of the original check, and below, it has an invoice.

The Court: Well, counsel, you appreciate the rule that it cannot be received unless you prove the loss and destruction of the primary evidence.

Mr. Castro: I realize that, your Honor, but I thought they had stipulated that these invoices which I have in my hand covering the Customaire—covering the fittings of the Customaire heater and the third invoice pertaining to a battery were submitted to the Herold Lumber Company under a statement which is Plaintiffs' No. 2 for Identification, setting forth the three serial numbers that are on the statement, and were paid by the Herold Lumber Company.

(Testimony of Charles W. Little.)

The Court: Well, all I have in my note here is that the negligence is the only question left.

Mr. Castro: Now, is there any dispute in that?

Mr. Desmond: Our stipulation was, your Honor, that the check which Mr.—which counsel had presented at that time was in payment of these three items. That was the stipulation.

Mr. Castro: I think that is sufficient foundation for it.

Mr. Desmond: It didn't go beyond that at all.

Mr. Castro: I think that is sufficient foundation, your Honor, for the offer in evidence of the three statements to go with the billhead, covering the three statements—in other words, these invoices have been——

The Court: It doesn't necessarily follow that a check was stipulated for the three statements, that those statements are the ones that were received.

Mr. Castro: I don't think they are disputing the fact——

Mr. Desmond: Well, furthermore, your Honor, I think it goes to another question. The question here is: If there was a fire, was the fire—was the heater and the matters discussed here the proximate cause of the fire due to the negligence of the defendant Galbreath. Now I don't think these invoices go to prove that question.

The Court: I had an impression at this time that we were down to the question of negligence.

(Testimony of Charles W. Little.)

Of course, if the question of negligence would be embraced in the matter of proximate cause——

Mr. Desmond: That is right.

The Court: ——but here, we are spending a lot of time wrangling whether or not these were invoices which came from the defendant and paid by the plaintiff. I thought that was agreed upon.

Mr. Desmond: I think you are right about that, your Honor. [31]

The Court: If we spend any more time, can we get down to the question of negligence and proximate cause? Objections are being made by counsel for the defendant and it seems to me that they are not in harmony with the understanding reached at the pretrial conference.

Mr. Castro: Then, we would ask that these three invoices or rather invoices marked Plaintiffs' Exhibit 2 for Identification and Plaintiffs' Exhibit 3 for Identification, together with invoice bearing date: 10-8-46, B-42186—(Showing to counsel.)——

Mr. Desmond: These two are where our objection goes, your Honor. Our stipulation went to Exhibit 1 and 3 for identification, that the check which counsel produced at that time was in payment of this, together with another invoice. Now that other invoice to go with this statement is incompetent, irrelevant and immaterial, has no part of the case, and it does not help in any way to prove the issues. That is what our objection is to these matters.

(Testimony of Charles W. Little.)

Mr. Castro: Then, I stipulate that Plaintiffs' Exhibit 3 for Identification may be offered in evidence.

Mr. Desmond: Yes.

The Court: Those two that you have in your hand——

The Clerk: Number 3.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 3.)

The Court (Continuing): ——one and three.

Mr. Castro: One is already in evidence, your Honor.

The Court: All right.

Mr. Castro: You may cross-examine.

The Court: Cross-examination.

Cross-Examination

By Mr. Desmond:

Q. Mr. Litttle, you had considerable business, you testified, with Mr. Galbreath over a considerable period of time, is that correct?

A. That's right.

Q. Now, can you give us the time that you had this first conversation with Mr. Galbreath about a stove?

A. I couldn't give the date. It was sometime within, I would say, two weeks before the fire—sometime within that date.

Q. And you agreed to purchase a heater from them? A. That's right.

(Testimony of Charles W. Little.)

Q. Now, you are sure you didn't go over and buy that heater on the morning of October 31, 1946?

A. Already been arranged that he had one when I was ready to get it.

Q. Did you go and get the heater?

A. I did not.

Q. Who went to get it? A. Mr. Albers.

Q. Now, about that time, had you ever bought any other [33] heaters of a similar kind from Mr. Galbreath?

A. Well, I think that's about the third heater I bought from them.

Q. About the third? A. Uh-huh.

Q. You bought one on the 10th of October, 1946?

Mr. Castro: Objection.

The Court: Overruled.

Q. (By Mr. Desmond): Did you purchase the heater in the name of the Sonora Lumber Company at Forest Hill on October 10, 1946?

A. I imagine it was about that time.

Q. And that was a used heater?

A. That's right.

Q. Did you purchase anything else with that heater?

A. Well, I am not sure. I think I might have purchased some stovepipe. I am not sure about it at the present time.

Q. You purchased six joints of 6-inch stovepipe, didn't you? A. That sounds right.

(Testimony of Charles W. Little.)

Q. And did you take that stove up to Forest Hill?

Mr. Castro: Objected to as irrelevant, immaterial and incompetent, no bearing on the heater in this case.

The Court: Overruled.

A. I didn't.

Mr. Desmond: Who did? [34]

A. One of the Sonora Lumber Company's pick-ups.

Q. Did you install it up there?

A. I did not.

Q. Who installed it?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial, no bearing upon the issue in this case.

The Court: Overruled.

Q. (By Mr. Desmond): Let me show you this Plaintiffs' Exhibit 1, Mr. Little. All that invoice calls for is one Customaire stove, is that correct?

A. That's right.

Q. Is there any charge there made for installation? A. No.

Q. Let me show you Plaintiffs' Exhibit 3, calling for fittings and oil and other things. Is there any charge made for installation?

Mr. Castro: Objected to as irrelevant, immaterial and incompetent, calling for the opinion of the witness.

The Court: It speaks for itself. Sustained.

(Testimony of Charles W. Little.)

Q. (By Mr. Desmond): Did you have any particular reason for wanting to have this heater in the office on the 31st of October?

Mr. Castro: Objected to on the grounds that it is irrelevant, incompetent and immaterial.

The Court: Overruled. [35]

A. We were trying to prepare the office so that I could move the bookkeeper from the house out to the office.

Q. You had just painted the office, had you not?

Mr. Castro: Objected to as assuming something in evidence not a fact.

The Court: Overruled.

A. It had been painted the day before.

Q. (By Mr. Desmond): What was it painted with? A. Standard Oil floor hardener.

Q. And that was the first material that went on the walls, was it?

A. That's the first and only.

Q. First and only material? A. Yes.

Q. Didn't you have a conversation with Mr. Galbreath that you wanted to get that heater to dry out the walls? A. No.

Q. Now, what time was the office painted?

A. Well, it was painted the day before. I am not sure but what some of it had been done the day before that.

Q. Was any of it painted on the morning of the fire?

A. There was a little patch of floor in back of

(Testimony of Charles W. Little.)

the door in front of the counter that hadn't been painted because the fellow that was doing the painting the day before—it was quitting time and that hadn't been finished and I think the front of the counter.

Q. The walls in back of the stove or where the stove was placed?

A. They had already been painted.

Q. What? A. They had been painted.

Q. They had been painted. Now, let me ask this question, Mr. Little: When these invoices are dated October 31, 1946, was that the date on which the deliveries were made?

A. That's the date of delivery and installation.

Q. Date of delivery and installation?

A. That's right.

Q. In other words, the stove was delivered to your office and installed on the same day, is that correct? A. That is correct.

Q. You were not there at the time the stove was installed or lit, were you?

A. I was in and out of the office maybe three or four times and I was out in the yard all afternoon.

Q. You were not there, you were at home I understand.

A. That's right. I had left maybe a half an hour or so before the fire to prepare myself for a late night.

Q. Now, you testified that you knew Mr. Albers, the gentleman that testified before you, is that right?

(Testimony of Charles W. Little.)

A. That is correct. [37]

Q. And, you state now that the stove was delivered to your plant and installed on the same day?

A. That's right.

Q. Yet, you said you sent Mr. Albers for this stove? A. I did.

Mr. Desmond: That is all.

Redirect Examination

By Mr. Castro:

Q. Now was there an oil storage tank to be used with this heater? A. That's right.

Q. And where was it located?

A. Approximately in the center of the building or at the center of the building, on the Sacramento Street side to the building.

Q. Can you indicate on the diagram, please?

(Witness goes to blackboard and indicates.)

Q. Would you mark "Tank"?

(Witness writes on diagram.)

Q. Now did you have any discussion with Mr. Harry Gregory concerning where that tank was to be located?

A. I think it was the other fellow that came over there with the pickup first. I just told him where I wanted to put the tank.

Mr. Desmond: Of course, Your Honor, I think that conversation is objected to upon the ground

(Testimony of Charles W. Little.)

that it did not take [38] place in the presence of the defendant.

The Court: What?

Mr. Desmond: It didn't take place in the presence of Galbreath.

The Court: Who was the conversation with?

Mr. Miller: Harry Gregory.

Mr. Desmond: Identified as Harry Gregory.

The Court: Let us connect it up. I assume that they have proof later on that he is the agent of the defendant. Unless it is connected up——

Mr. Castro: That is the purpose of it, your Honor.

The Court: You may prove it. Strike it.

Q. (By Mr. Castro): Can you state that conversation?

A. I told Mr. Galbreath's man where——

Mr. Desmond: I ask that that go out.

The Court: You told that man Gregory, you mean?

Q. (By Mr. Castro): No, you didn't tell Harry?

A. No, I said that the man came over there first with the pickup.

Q. (By the Court): You told him what?

A. I told him where to put the tank and the tubing to run under the floor and away from the open space in back where it wouldn't be interfered with by lumber being put in there.

Q. (By Mr. Castro): And did you indicate where the heater was to be connected in the office?

(Testimony of Charles W. Little.)

A. The location of the heater was already placed by the outlet into the patent flue.

Q Where was the outlet on the patent flue?

A. Right in here.

Q. What? Would you indicate that with chalk, please? A. (Witness indicates.)

Q. Now, was the tank and the stove connected that afternoon?

A. I would say that they were.

The Court: Well, do you know whether or not they were connected?

A. Well that's what the men were there for and that's what——

The Court: You don't know whether they were connected or not?

A. Yes, they were connected.

The Court: I thought you said you didn't observe what they were doing.

A. Well, that's what they were there for and the stove was connected.

The Court: It was connected, you say that?

A. It was connected, yes.

The Court: All right.

Q. (By Mr. Castro): Now, have you ever seen that man that was there with Harry Gregory again?

Mr. Desmond: We object to that as assuming something not in evidence.

The Court: Overruled. [40]

A. No.

(Testimony of Charles W. Little.)

Q. (By Mr. Castro): Did you know his name?

A. No.

Mr. Castro: You may cross-examine.

Recross-Examination

By Mr. Desmond:

Q. Who constructed the platform on which the oil was placed?

A. One of Mr. Wold's men.

Q. Who is Mr. Wold?

A. Mr. Wold is the contractor who had the job of furnishing the labor for this building.

Q. Did you tell this man that you referred to, that you showed Mr. Galbreath's man where to put the oil barrel? A. Yes.

Q. Did you tell him what to do with the tubing?

A. I did not, except to run it in back of the foundation under the floor.

Q. Running it under the floor?

A. That's right, sir.

Q. Did they have anything to do with installing the chimney? A. No.

Q. Was there any stovepipe purchased with this stove?

A. Well, I don't remember whether there was any stovepipe purchased or whether we had some there or not.

Q. You are not sure? [41]

A. I know that Mr. Galbreath had what was necessary to set it up, so I can't answer that.

(Testimony of Charles W. Little.)

Q. Well, there was no stovepipe listed on the invoice, is there? A. I noticed that.

Q. Do you think you used some stovepipe of your own there?

A. Well that I can't answer.

Q. You don't know?

A. If there was some——

Q. Do you know who installed the stovepipe?

A. The stovepipe?

Q. Yes.

A. Or the flue?

Q. The stovepipe or the flue?

A. Or the flue?

Q. The stovepipe.

A. The stovepipe from the stove to the flue?

Q. Yes. A. I do not.

Mr. Desmond: That is all. Just a moment——

Q. Would you know the man that you saw around there before Mr. Gregory came, if you saw him again?

A. Well, I am not sure that I would.

Q. Would you mind looking at the gentlemen in the courtroom to see if you can identify the man?

A. Well, I don't see anybody that I could identify as such.

Mr. Desmond: That is all.

Redirect Examination

By Mr. Castro:

Q. Now, the painting which had been done on the day of the fire was in what area in the office?

(Testimony of Charles W. Little.)

A. The painting the day of the fire would have been right in this area, in back of the door in front of the counter. (Indicating.)

Q. Would you mark that with an X-1?

A. (The witness makes a mark on the diagram.)

Mr. Castro: That is all.

Recross-Examination

By Mr. Desmond:

Q. Are you familiar with the type of material that is known as Standard Oil floor hardener?

A. Well, no, not too familiar with it.

Q. Do you know whether or not it is inflammable?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial, no proper foundation laid, and calling for an opinion.

The Court: Overruled.

A. I would say it was.

Q. (By Mr. Desmond): It was? A. Yes.

Mr. Desmond: That's all.

The Court: Recess. [43]

(A recess was taken at 10:00 o'clock a.m.)

Mr. Castro: Mr. Jack Little.

JACK E. LITTLE

Called by the plaintiffs, sworn.

Direct Examination

By Mr. Castro:

Q. What is your name in full?

A. J. E. Little.

(Testimony of Jack E. Little.)

Q. Where do you live? A. Forrest Hill.

Q. And how long have you resided there?

A. About two years and a half.

Q. Prior to that date, where did you make your home? A. Sacramento.

Q. What is your occupation?

A. At the present time, I am in the lumber business.

Q. How long have you been in the lumber business? A. Two years and a half.

Q. Are you acquainted with the Herold Lumber Company located at Auburn, California?

A. Yes, sir.

Q. And were you at that place of business on the 31st day of October, 1946?

A. If that's the day of the fire, I was there.

Q. And what time of the day did you get there?

A. Well, it was late afternoon, I think, around four o'clock. [44]

Q. And when you got there, did you go into the office of the Herold Lumber Company?

A. Yes.

Q. And what was in that office when you went in?

A. Well, there was only two desks and a stove, chairs, and a counter.

Q. Were there any other people in the office besides yourself? A. When I went in there?

Q. Yes. A. I think so.

Q. And were they men or women?

A. Men.

(Testimony of Jack E. Little.)

Q. Was Harry Gregory present in the Courtroom one of those men? A. Yes.

Mr. Desmond: We submit that as leading and suggestive, your Honor; objected to on that ground.

The Court: Overruled.

Q. (By Mr. Castro): And was there anybody besides yourself and Mr. Gregory?

A. When I first went into the office, Glenn Carns was in there.

Q. (By Mr. Miller): What was that name?

A. Glenn Carns. And there was another workman in there [45] working on the stove.

Q. (By Mr. Castro): And do you know the name of that workman? A. No, sir.

Q. What was Mr. Gregory doing?

A. I didn't pay any particular attention what either of them were doing except that they were working on the stove installation.

Q. Now, how long did you remain in the office?

A. Well, the first time I went in, I was only in there a few minutes, long enough to make a long distance call.

Q. What did you do then?

A. I was out in the yard where they were loading lumber, probably back in the office several times until I finally went in to make some telephone calls.

Q. And who did you go in to make a telephone call to?

A. Oh, I don't recall who I may have called

(Testimony of Jack E. Little.)

except that at the time the fire started, I was talking to my brother Charles.

Q. Now, where was that stove located?

A. Well, the stove was located on the east side of the room.

Q. Would you indicate on the diagram approximately the location of the stove?

A. (The witness goes to the blackboard.)

Q. Here is a piece of chalk. Draw a line from that rectangle and mark it "Stove." [46]

A. (Witness draws on diagram.)

Q. Do you know what type of stove that was?

A. I know that it was an oil stove.

Q. You may have a chair. (The witness takes the witness stand.)

Now, when you returned in to the office the second time, did you see the other man or Mr. Gregory, or both of them in the office?

A. Both of them in there.

Q. And what were they doing on that occasion?

A. Well, they—while I was telephoning, I don't know what they were doing. When I came in, while I was telephoning, Mr. Gregory lit the oil stove.

Q. Will you describe how he——

A. I might say prior to that time, he mopped up the floor under the stove with a wiping rag and then lit the stove.

Q. Describe how he lit the stove.

A. Well, he opened the port and threw a match in.

(Testimony of Jack E. Little.)

Q. And then what happened?

A. Well, a sort of puff, and then everything happened so fast, the next thing I noticed there was a square of fire under the stove.

Q. Where was that fire with relation to where the wiping had been?

A. Well, it was in that area. It was—the strange part [47] of it was that the fire was almost exactly the dimensions of the stove, as though the lines had been drawn in a square.

Q. Now, did Mr. Gregory do anything after the puff or poof that you have described?

A. Yes, he took his jacket and attempted to beat it out.

Q. And when he did that, what happened to the fire? A. Well, nothing happened to it.

Q. Did it spread in any direction?

A. Well, it was spreading at the time.

Q. Now, did he do anything with the heater itself?

A. Yes, he attempted to pick it up and tripped with it, and, of course, it was fastened down with a copper tube, and my impression is that when he let it go, the stove fell on its side.

Mr. Desmond: I will object to that, your Honor, as being the opinion of the witness, and that it be stricken.

The Court: He is giving his best recollection as to what happened. Overruled.

(Testimony of Jack E. Little.)

Q. (By Mr. Castro): And then, after it fell on its side, what took place?

A. We all got out of there.

Q. And then what happened?

A. Well, almost immediately after it, I hung up the 'phone which I did as soon as I saw the fire. The fire started up the inside of the wall. It traveled up the wall like a [48] raising a curtain. It almost immediately spread the full width of the room, went up the wall and across the ceiling and started down the other sides.

Q. And then did you leave it?

A. I went out on my hands and knees.

Q. And did the other two men do likewise?

A. I presume they went out the back door. I wasn't watching.

Q. Did you see them on the outside?

A. Not that I can remember.

Mr. Castro: You may cross-examine.

Cross-Examination

By Mr. Desmond:

Q. You stated, Mr. Little, that a man by the name of Glenn Carns was present.

A. He was present not at the time of the fire but before.

Q. Well, when did you see him then?

A. I saw him the first time I went in to telephone.

Q. And that was approximately 4:00 o'clock?

(Testimony of Jack E. Little.)

A. Probably around 4:00 o'clock or perhaps a little bit later.

Q. By the way, who was he employed by?

A. Mr. Carns was salesman for the Herold Lumber Company.

Q. I see, and you say there was another workman. Who was that, do you know?

A. When I first went in the office, there were some carpenters working on the counter and these men working on the stove, and there may have been others going in and out on a building [49] under construction.

Q. Had carpenters been working there all afternoon? A. I couldn't say. I wasn't there.

Q. But you were there working in this office at 4:00 o'clock when you first arrived? A. Yes.

Q. Were there any painters working in there?

A. Not that I can remember.

Q. Had there been painters working there that day? A. That I don't know.

Q. Do you recall, by the way, what time this fire was?

A. Well, it was shortly before five. I don't have the exact time of it.

Q. And the stove—had the stove been burning prior to that time?

A. I think so. It was quite cold outside that day and I went inside because it was warm in there.

Q. I see. That was when, about 4:00 o'clock?

A. Yes.

(Testimony of Jack E. Little.)

Q. I see; and the stove was burning at that time?

A. I don't know that it was burning—it was warm in the office.

Q. Uh-huh. Now, you stated you made some telephone calls. A. Yes.

Q. Do you recall who you 'phoned? [50]

A. I called the Herold Lumber Company office in San Francisco immediately that I got there. I am not sure, I may have called after there, except the——

Q. Did you have any conversation with the Herold people in San Francisco regarding insurance?

A. Yes.

Q. What was the conversation?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial.

The Court: What is the competence?

Mr. Desmond: I think we can connect this up, your Honor, into other very material facts.

The Court: State how you expect to connect it up, to what proof?

Mr. Desmond: Well, we offer to prove that at that time within—during these conversations, Mr. Little was either instructed to increase the insurance on the property there and that he had actually increased the insurance on the property within a few minutes before the fire. We also will prove that at the time Mr. Little failed to send in a fire alarm to make any attempt or effort to reduce any damage which might be caused by the fire and that,

(Testimony of Jack E. Little.)

actually, he instructed the fire chief of the volunteer fire department to stop playing water upon the fire. The purpose, of course, being that there is a proof of loss here in stipulation that a total [51] amount of ninety-two hundred and some dollars was paid as loss. It is our contention that the circumstances will prove that that loss could have been very materially reduced.

The Court: I will receive it. Overruled.

Q. (By Mr. Desmond): Did you have a conversation with the Herold Lumber Company with reference to insurance?

Mr. Castro: Same objection, your Honor,——

The Court: Overruled.

Mr. Castro ——to the entire line of questioning.

The Court: Answer it.

A. Yes, I did.

Q. (By Mr. Desmond): What was that conversation?

A. I asked what the amount of insurance was in force and whether or not there was any insurance on contents, and when I received the answer, I suggested that the insurance be increased.

Q. I see. What amount of insurance was on this building? A. I don't remember.

Q. Well, did you later have it increased?

A. I had it increased right then.

Q. Who did you contact to increase it?

A. It was increased through Mr. Barroca.

Q. Who is he? A. He is our broker.

(Testimony of Jack E. Little.)

Q. In Auburn? [52] A. In San Francisco.

Q. I see. Did you 'phone to Mr. Barroca?

A. I 'phoned the Herold Lumber Company office and left the message.

Q. To increase the insurance? A. Yes.

Q. Now what was the amount of insurance on the building at that time? A. I don't recall.

Q. You don't know? A. No.

Q. Did you take out the building permit in the City of Auburn for the construction of the building? A. No, I think not.

Q. Do you know who took out the building permit?

A. I imagine it was gotten out by Mr. Wold.

Q. Do you know what the amount of the permit was?

Mr. Castro: Objected to as immaterial, incompetent and irrelevant, the damage has been stipulated hereto as the loss of so many—about five thousand on the building and forty-one hundred, I believe, on the merchandise.

Mr. Desmond: No, the only stipulation that was made was that there was insurance, and the proof of loss as presented here was that that had been paid. Now, we have, I think, under the complaint where they allege that they suffered [53] certain damages. The mere fact that they paid it is not binding upon this third party who is accused here of starting a fire. We will prove that is the situation.

(Testimony of Jack E. Little.)

Mr. Castro: May I address the Court a moment, your Honor? If I understand counsel's position at this time of putting in dispute the loss which occurred there as to the value of the building which was destroyed and as to the value of the merchandise destroyed, I thought that pretrial conference had addressed itself to that point and it was stipulated that it was in negligence.

The Court: I thought so too, but there was no order on the pretrial conference—no formal order made, and all I have in my notes is that the only issue is to the issue of negligence. I am quite sure, Senator, that at that conference you so stated that the only issue to be tried was the issue of negligence.

Mr. Desmond: I thought, also, your Honor, the question of damages was involved. Now, perhaps I am in error and if I am, I certainly want to correct my situation at this time. My understanding of the stipulation concerning the proof of loss was that the loss was paid in the amount specified, but we questioned the amount of damage.

Mr. Castro: No, that is the first time I have heard that. I would have certainly brought more witnesses here if that point was going to be in issue. [54]

The Court: Well, I am going to hold you to your pretrial stipulations and if you take it up with the reporter during the noon hour, and if there was such a stipulation made, and too, it is my best recollection that was the understanding that there was

(Testimony of Jack E. Little.)

no issue in this case except the question of negligence.

Mr. Desmond: Well, we will defer it then until we check it.

The Court: I think you had better defer any examination along this line until you clear that up.

Mr. Desmond: Very well.

Q. Did you see this stove lighted, Mr. Little?

A. Yes.

Q. Which are we to believe now. You have stated the room was warm when you went in there. Now you state that while you were there, the fire was lighted. Now which is correct?

A. I would say that both are correct.

Q. Both are correct? It had been burning then before you went in?

A. I don't know. I just know the room was warm.

Mr. Miller: He said "I believe so."

Q. (By Mr. Desmond): Were you there from the hour of 4:00 o'clock till the fire started in the office? A. No, not all the time.

Q. Well, I thought on your direct testimony you stated you [55] went in the office, you arrived around 4:00 o'clock, you were in there for a few minutes, went out into the yard. Now how long did that take?

A. I don't know. I was in and out several times.

Q. You were in there for these several conversations how long; did they all occur at the same

(Testimony of Jack E. Little.)

time? A. No.

Q. They were from the time you were going in and out? A. That's right.

Q. And all of that time you say Mr. Gregory was there and another workman?

A. No, I don't say that they were there all of the time.

Q. Now just clear that up, will you please?

A. Yes, I can't say where they were when I went in the room.

Q. Were they in and about the building there all the time? A. Yes.

Q. Both of them?

A. I can't answer as to that.

Q. Can you identify the other workman?

A. I doubt it.

Q. You know whether or not he is in court today?

A. I haven't seen anybody here whom I would recognize as being that man.

Q. Do you know the names of these carpenters that were in the [56] room?

A. No, I don't know the names of any of them.

Q. Do you know the names of any painters?

A. No.

Q. Now was this building constructed under your supervision?

A. Well, no, not exactly. I had no official connection with the Herold Lumber Company. I drew up the original drawings for the building. The

(Testimony of Jack E. Little.)

Herold Lumber Company is affiliated with the Sonora Lumber Company of which I am in charge of the Forrest Hill end, and the building was built under the supervision of Mr. Wold, the contractor.

Q. Do you know whether or not he employed the painters?

A. No, I don't know, but I presume he did.

Q. You don't know who did the painting then?

A. No, sir.

Q. Now do you know what the walls of this office were painted with? A. No.

Q. Isn't it a fact that they were painted with Standard Oil hardener?

Mr. Castro: He says he don't know.

Mr. Desmond: Oh.

Mr. Castro: We will stipulate to it, counsel. We have no objections to it, your Honor. It was painted with Standard Oil floor hardener which was provided by the Sherwood-Williams [57] Company and sold as a Standard Oil product. The point of inflammation is 105 Fahrenheit. The flash point is 105 degrees.

Mr. Desmond: Will you stipulate it's a material highly inflammable?

Mr. Castro: I will not and you can't get a witness to prove that either.

Q. (By Mr. Desmond): Isn't it a fact, Mr. Little, that this Mr. Gregory picked up a coat off the desk on your counter there and attempted to move the stove?

(Testimony of Jack E. Little.)

A. I don't know where he got the coat. The thing he was beating the flames with, in my recollection, was a leather jacket—whether he had it on the counter——

Q. You testified on direct examination that he took it off—took his coat off. Which is correct?

A. I don't know.

Q. You don't know. Now did you see the fire on the wall about the time it started?

A. I didn't see the fire on the wall for several seconds after I saw the fire on the floor. In fact, I didn't see the fire on the wall until after Mr. Gregory had picked up the stove.

Q. Did you have—could you see the wall from were you were sitting, immediately behind the stove? A. No, sir.

Q. You couldn't see the wall? [58]

A. No.

Mr. Desmond: That is all.

Redirect Examination

By Mr. Castro:

Q. Where were you at the desk, could you indicate on the diagram where you were when you saw the fire start?

A. (Witness goes to diagram and indicates.) Well, now, I believe that I was in between the desks.

Q. And facing in what direction?

A. Facing the stove, either here or here (indicating)—I am not sure. If the desks were close together, I was sitting here.

(Testimony of Jack E. Little.)

Q. Mark that "X-1" as the position of the witness at the time you saw the fire. At that time you were facing in what direction?

A. I was facing directly towards the stove.

Q. And where was Mr. Gregory?

A. At the time the fire started?

Q. Yes.

A. He was on this side of the stove. (Indicating.)

Q. That will be a point which we will mark as "X-2."

A. I mean I don't know where he was when the fire started, but he was about here when he started to beat the flames.

Q. Mark "X-2" as the position of Mr. Gregory at the time he was beating the flames. [59]

A. (Witness marks on diagram.) Immediately before that, I couldn't see where either man was standing.

Q. Did you see Carns do anything at all with the stove?

Mr. Desmond: Just a minute. I missed that name. Mr. Who?

Mr. Castro: Carns.

A. Mr. Carns was not in the—Carns to the best of my recollection was not in the room at the time the fire started.

Q. Do you know where Mr. Carns is today?

A. Mr. Carns is dead.

Mr. Castro: You may cross-examine.

(Testimony of Jack E. Little.)

Mr. Desmond: That is all.

Mr. Castro: No further questions.

Mr. Desmond: Just one.

Recross-Examination

By Mr. Desmond:

Q. At the time, Mr. Little,—you won't need to sit down—what was Mr. Carn's occupation?

A. He was a salesman.

Q. For the Herold Lumber Company?

A. For the Herold Lumber Company.

(Then there followed the testimony of Mr. Sam Galbreath.) [60]

Mr. Castro: Call Mr. Sam Galbreath for cross-examination under Rule 46-A of the Civil Procedure Act.

SAM GALBREATH

Called by the plaintiffs under Rule 46-A of the Civil Procedure Act, sworn.

The Clerk: Will you take the stand, please?

Cross-Examination
(Rule 46-A)

By Mr. Castro:

Q. What is your name in full?

A. Sam L. Galbreath.

Q. Are you the defendant in this action?

A. Yes, sir.

Q. Where is your place of business?

(Testimony of Sam Galbreath.)

A. Auburn, California; Sacramento Street.

Q. How long have you operated there?

A. Oh, 1930; eighteen years.

Q. Do you know Harry Gregory? A. Yes.

Q. How long have you known him?

A. Oh, some ten or twelve years.

Q. During that time has he been in your employment? A. Not all of that time.

Q. For how long? A. Four or five years.

Q. What is that?

A. Some four or five years of that time he has, yes. [61]

Q. What period do those four or five years cover?

A. It covers from the present date back.

Q. In other words, he was in your employment during the month of October, 1946?

A. Yes, sir. Uh-huh.

Q. Now what were his duties?

A. Well he makes deliveries of fuel oil, or installs stoves, general driving for delivery. He also delivers gasoline and other petroleum products.

Q. Now, did you have anybody else in your employment on the 31st day of October, 1946?

A. Oh, yes.

Q. Whom else?

A. Well, I had—Dependener.

Q. How do you spell that?

A. (Spelling): D-e-p-e-n-d-e-n-e-r, Dependener.

Q. What is his first name? A. Bert.

(Testimony of Sam Galbreath.)

Q. Is he still in your employment?

A. Yes.

Q. Anybody else? A. Yes.

Q. Whom else?

A. Well, at that particular time, I had Cerino Lemos, Dependener, my oldest son—— [62]

Q. What is his name?

A. Jim H. Galbreath. There was five at the time, if I recall; Cerino Lemos and another boy.

Q. How do you spell Lemos?

A. (Spelling): L-e-m-o-s.

Q. Is there a fifth man that you do not recall?

A. I don't seem to be able to recall that particular one.

Q. What was the man's duties whose name you don't recall?

A. Well, he first was a mechanic. He had Gregory, Galbreath and Dependener and Lemos.

Q. (By the Court): Well, did you have anybody that was working with Gregory on the date of this fire?

A. He wasn't on the truck with him, your Honor. However, he was working. He is the boy that delivered the tubing and the drum.

Q. What is that man's name?

A. Cerino Lemos.

Q. (By Mr. Castro): Did you direct him to deliver those fittings there to the Herold Lumber Company? A. Yes; uh-huh.

(Testimony of Sam Galbreath.)

Q. And those are the fittings described in Plaintiffs' Exhibit No. 3?

A. Yes, it's the ticket with the boy's initial on it.

Q. That's what the CL stands for?

A. Yes; C. L. Lemos. [63]

Q. And do you recognize the initials on Plaintiffs' Exhibit No. 1? A. Oh, yes.

Q. Whose initials?

A. They are Mrs. Galbreath's. D. G.—Dorothy.

Q. That is your wife or daughter?

A. My wife.

Q. Did she deliver the stove? A. No.

Q. Now, the heater which was sold to the Herold Lumber Company was a Customaire heater?

A. Yes, uh-huh.

Q. Is that an oil or gas heater? A. Oil.

Q. What size?

A. 30 or 35,000 B.T.U. capacity. I forget. There was the two particular sizes. If it isn't stated on that ticket, that is 35,000 B.T.U. If it is stated on there——

Q. It is not. A. It's thirty-five, then.

Q. Now, I show you Plaintiffs' Exhibit 2 for Identification——

Mr. Desmond: Just a moment, your Honor, I don't believe that that was put in for identification.

The Court: Yes, it was.

The Clerk: Yes. [64]

Mr. Desmond: All right.

The Witness: I will have to see about that.

(Testimony of Sam Galbreath.)

Forty-two eight-six—that charge was for a battery.

The Court: There was no question put to you yet.

Q. (By Mr. Castro): Is that Plaintiffs' Exhibit No. 2 for Identification on your letterhead or statement head?

A. I don't quite get it, will you ask me that again.

Mr. Castro: Please read the question.

(Question read.)

A. Yes, this is our name, and the statement we mailed to the customer.

Q. And did it refer to invoices Numbers B-42277 and B-10543? A. Yes.

Q. Plaintiffs' Exhibits No. 1 and 3 respectively?

A. I don't know whether I have it or not. 10543 and the other number is 42227; however there is one here 42186 on there with that. Do you have that?

Q. That is the one, I believe, covering the battery. A. Oh, yes; I see.

Q. Now was that statement, Plaintiffs' Exhibit No. 2 sent to the Herold Lumber Company together with the invoices Plaintiffs' Exhibits numbers 1 and 3, the original or a carbon copy of those?

A. One or both of those would be attached to this one that was mailed to me, unless they were there. Their office was [65] open and they demanded or requested, or the boy offered them to them. However, in many cases, they are attached to the statement and mailed out.

(Testimony of Sam Galbreath.)

Mr. Castro: Now we offer this in evidence.

The Court: It is number 2 in evidence. It may be received.

(The document referred to was then received in evidence and marked Plaintiffs' Exhibit No. 2.)

Mr. Castro: (Exhibit No. 2 was then read into the record.)

Q. Now, had you sent Mr. Gregory to the Herold Lumber Company on the day of the fire?

A. No.

Q. Had you sent Mr. Lemos? A. Yes.

Q. What time had you sent him there?

A. Oh, between 10:30 and 12:00 o'clock; nearer 12:00 or 1:00. It was the middle of the day.

Q. You think it was somewhere near the middle of the day?

A. Yes, there is too much time elapse there.

Q. You think it was late in the morning or the first thing in the afternoon?

A. Well, I would say midday.

Q. Now, at that time, how did he go there?

A. Oh, he drove a ton pickup truck. [66]

Q. And who owns that pickup truck?

A. I own it.

Q. Had you been using it in your business?

A. Yes.

Q. Do you know how long Mr. Lemos remained there? A. No, I don't.

(Testimony of Sam Galbreath.)

Q. Can you tell me approximately?

A. Oh, I would say three hours.

Q. Do you know what he did?

A. Two and a half or three hours.

Q. Do you know what he did during that time?

A. Yes.

Q. What?

A. Well, he waited to build a stand to set this tank on.

Q. Is that the tank referred to in this diagram as—— A. It was the 50-gallon tank.

Q. Indicated by this circle?

A. I am not familiar with where it was sitting. I can't answer that.

Q. Did you furnish a tank for the oil?

A. Yes.

Q. What else did he do while he was there?

A. Well, I wasn't there myself; however, they are supposed to have put this drum on the stand and pumped oil in it and put the valve on; and it seems there was some delay in [67] in the waiting for them to complete the stand.

Q. Did you see him do anything with that oil drum or oil tank?

A. No, outside of loading at the plant.

Q. Did you instruct him to connect the oil tank with the heater? A. Not with the heater.

Q. Did you instruct him to connect the tubing between the heater and the oil tank? A. No.

Q. What did you tell him to do with that tubing?

(Testimony of Sam Galbreath.)

A. I told him to put a valve on and deliver the connections and tubing.

Q. Where was the valve to be put?

A. At the tank.

Q. And what was the purpose of putting that valve there?

A. To hold the oil. You can fill your tank with oil and it will retain the oil until you—whatever time it might be used.

Q. And then, does the tubing run from that tank to the heater? A. Yes, sir; uh-huh.

Q. Do you know whether he connected the tubing to the tank and the heater?

A. No, I don't.

Q. Now, did you send Mr. Gregory there? [68]

A. No, I didn't send him there.

Q. Do you know whether Mr. Gregory went there that afternoon of the fire? A. Yes.

Q. What time did he go there?

A. I don't know that.

Q. Can you tell me approximately?

A. No, I couldn't tell you approximately.

Q. Can you tell me whether he went there before or after Lemos?

A. He went there and gave him his orders to make some deliveries, but at what time it was, I don't know.

Q. "He went there." To whom are you referring? A. Mr. Gregory.

Q. Did Mr. Gregory deliver something at the Herold Lumber Company?

(Testimony of Sam Galbreath.)

A. Not to my knowledge.

Q. He had some other deliveries to make?

A. Yes, sir.

Q. And did he make those deliveries?

A. The other deliveries; yes.

Q. And after he completed them, then did he go to the Herold Lumber Company?

A. Yes, sir.

Q. Can you tell me about what time he got there?

A. No, I can't.

Q. Or how long he remained?

A. No, I can't do that either. He was there when the fire started.

Mr. Castro: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Castro: That is the plaintiffs' case, I believe, your Honor.

Mr. Desmond: If your Honor please, we would like to make a motion at this time. I wonder if it wouldn't be better to postpone the matter until, say, 1:30?

The Court: You can make your motion; and I have got the grand jury coming in here in five minutes.

Mr. Desmond: At this time, your Honor, we would like to move for a non-suit. We base our motion upon the fact of the allegations in the complaint and the utter lack of proof submitted by the

plaintiff to substantiate the allegations in the complaint; the allegations in Paragraph IV. This is an action set forth in two causes of action, and both causes are identically the same with the exception, of course, as to the plaintiff named in the second cause of action. The whole theory of this case is predicated upon the recovery of the loss paid by reason of a fire which occurred at the Herold Lumber Company, which loss was paid by [70] the Home and Sun Insurance Companies, or Homestead Insurance Company, and now they come in to court with an action upon the theory that the proximate cause of this fire was the negligence in the installation of a stove which is identified here as an oil burning stove installed by the defendant, Sam Galbreath.

We don't deny the fact that the stove was sold by the defendant Galbreath to the Herold Lumber Company. We will go on, if required, and prove additional facts concerning it, but we believe that the plaintiff has not in any way substantiated his cause of action by one single iota of proof that, first: the fire was caused by reason of the stove; and secondly: the proximate cause of that fire was the negligent installation of the stove. There is absolutely no—there is certainly no clear-cut evidence here that the stove was actually installed by the defendant, Galbreath; and I think that is point number one they must prove. Point number two is that it was negligently installed, and they have

failed utterly to prove that. And point number three is that the negligent installation of the stove was the thing that caused the fire.

We believe that none of the allegations in that respect have been sustained by any of the proof produced by the plaintiff, and therefore move for a non-suit.

The Court: Now, gentlemen, I am going to recess until One [71] this afternoon. I am obliged to go to San Francisco in the afternoon, so I am going to get rid of it, if I can, before the afternoon is over—before I have to leave.

Mr. Castro: What time did your Honor want to leave?

A. I want to leave at 3:00 o'clock.

(A recess was taken until 1:00 o'clock p.m.)

Afternoon Session—May 11, 1948—1:00 p.m.

The Court: You may proceed.

Mr. Desmond: Call Mr. Galbreath.

The Clerk: Will you take the stand, sir? You were sworn this morning.

SAM GALBREATH

called by the defendants, previously sworn.

Direct Examination

By Mr. Desmond:

Q. I believe you have already been sworn, Mr. Galbreath. You are the defendant in this action?

A. Yes.

(Testimony of Sam Galbreath.)

Q. And I believe you have testified that your business is up in Auburn, and you operate a distributor plant—distribution plant?

A. Yes, sir.

Q. Now, Mr. Galbreath, do you know Mr. Jack and Mr. Charles Little? A. Yes.

Q. Do you recall having a conversation at your plant with Mr. Charles Little concerning the sale of a stove? A. Yes.

Q. When did that conversation occur?

A. Oh, somewhere between the 20th and 25th of October.

Q. 1946? [73] A. Yes.

Q. Where did it occur?

A. At my plant—place of business.

Q. Was anyone else present?

A. I don't recall that.

Q. What was the nature of the conversation?

A. He wanted to purchase the stove and wondered if I might have it ready for delivery *with* a few days. No date of delivery was set. I told him that I could do that. He asked me to get together the necessary tubing and valve and the stove and the container for the oil, that he was going to heat his office.

Q. Did he have any conversation with you about drying out paint or anything of that sort?

A. Not at that time.

Q. I see. Now, when did you next see Mr. Little?

(Testimony of Sam Galbreath.)

A. Well, I saw Mr. Little almost daily. There was other transactions.

Q. Well, did he come to your plant to secure a stove? A. Yes.

Q. Will you tell us the circumstances of that, please?

A. Well, I was under the impression—I am positive of one thing. That whoever picked up the stove, I set it over the platform and it was took away on the bumper of a car.

Q. Did you know who was driving that car? [74]

A. As to the conversation prior, they were going to have that stove installed by the time I could get the man there with the container.

Q. What was that?

Mr. Castro: May we have the time and place and the identity of the party, your Honor?

The Court: Proceed.

Q. (By Mr. Desmond): Did someone come to your plant from the Herold Lumber Company to secure the stove? A. Yes.

Q. Who came there?

A. I was under the impression that it was Mr. Little.

Q. Which Mr. Little? A. Charley.

Q. I see; and what day was that?

A. That was the 31st of October.

Q. 1946? A. Yes.

The Court: You are not sure of that?

A. I am sure of the date.

(Testimony of Sam Galbreath.)

Q. You are not sure that Mr. Little himself came to get the stove?

A. No, sir; I am not, your Honor.

Q. You heard Roy Albers testify that he got it?

A. Yes. [75]

The Court: You are not prepared to say that that is not a fact?

A. I don't recognize Mr. Albers, and it occurs to me that I could if I had of saw him around there before. This is my first——

Q. Well, do you recall that somebody came there for the stove?

A. Oh, yes; very distinctly, sir.

Q. But you can't say whether it was Little or not? A. No; I was under that impression.

Q. (By Mr. Desmond): Do you know how they hauled the stove away from your place?

A. The bumper of a car.

Q. On the bumper of a car? A. Uh-huh.

Q. Now, that was on the 31st day of October, '46? A. Yes, sir.

Q. Now, did you have any conversation at any time with Mr. Little concerning the installation of the stove?

A. No, sir; nothing outside of the material. I ordered a valve for the tank and the tubing and connections. He didn't ask for an installation.

Q. Did the person who picked up the stove have any conversation with you? A. Yes.

Q. What was that conversation? [76]

(Testimony of Sam Galbreath.)

A. It was that he would have it set.

Mr. Castro: Now, let's identify that man. We object to it until the identity of the man is established.

The Court: He doesn't remember who it was, but he knows that a person got the stove and made that statement. Go ahead.

Q. (By Mr. Desmond): What did he state at that time?

A. He stated that he would like to have us get over there at the earliest convenience; that he would have the stove set and the stand built and that we would set the tank and put oil in it. They wanted to dry the office out.

Q. And then he took the stove away with him?

A. Yes.

Q. Now, did you bill him for that stove?

A. I took the account of it from off of the order. It was on an order on the desk, as we take orders for any merchandise we sell. I take it off and put it in my holder; and when I went home in the evening, I turned it in to the office.

Q. That was Mrs. Galbreath who made this ticket? A. Right.

Q. Now, I call your attention to Plaintiffs' Exhibit 1, this invoice. Now was any charge there made for the installation of a stove?

A. No, this is just one Customaire heater.

Q. It was for the stove itself and the sales tax;

(Testimony of Sam Galbreath.)

that was [77] the original charge that was made?

A. Yes.

Q. Now, later, did you give any instructions to Cerino Lemos concerning this transaction?

A. Yes.

Q. And was he your employee at that time?

A. Yes.

Q. And what were those instructions?

A. I instructed him to——

Mr. Castro: I move it is hearsay. Objected to on the grounds of hearsay.

The Witness: The container and the oil——

Mr. Castro: Just a moment, I have an objection.

The Court: You mean instructions as to his own employee?

Mr. Castro: Yes.

The Court: Overruled.

Q. What were your instructions?

A. To deliver the drum—that's the oil container; told him to put it on the stand when they had the stand ready and put enough oil in it for temporary installation; that they planned later on getting a larger tank.

Q. (By Mr. Desmond): Now, was that the material shown on the invoice, Plaintiffs' Exhibit 3?

A. Yes. [78]

Q. What is your practice with reference to charges when the heater is installed?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial.

(Testimony of Sam Galbreath.)

The Court: Sustained.

Q. (By Mr. Desmond): Did you give any instructions to any of your employees any other than what you have recited here, to deliver this material to the plant of the Herold Lumber Company?

A. No, that's all.

Q. Did you have any arrangements with the Herold Lumber Company or any of its employees to install this stove? A. No.

Q. Did you deliver any stovepipe for this stove?

A. No.

Q. Was any ordered from you? A. No.

Q. Did you secure a permit from the Building Inspector of Auburn for the installation of a stove?

A. No.

Q. Is a permit from the Building Inspector of Auburn required when you install these oil stoves?

Mr. Castro: Objected to as calling for an opinion.

The Court: Sustained.

Q. (By Mr. Desmond): Now, Mr. Galbreath, does your name [79] appear on any of your trucks or trucking equipment? A. No.

The Court: Did it at that time?

Q. (By Mr. Desmond): Did it on October 31?

A. No, sir; not at that time.

Q. Has it ever appeared on your trucks or trucking equipment? A. Yes; in the past.

Q. What time?

A. Yes, in the past, my name was on all of them.

(Testimony of Sam Galbreath.)

Q. Now, this trip by Mr. Lemos delivering this merchandise, was that made on the afternoon of the same day that the stove was taken from your plant?

A. Yes.

Q. Did you go over to the lumber plant at any time during that afternoon? A. No, I didn't.

Q. Were you there at the time of the fire?

A. No, not at the beginning of it, no.

Q. When did you arrive there?

A. Oh, I would say it was perhaps within the hour. I don't know how quickly it burned, but it was—well, a fire, half burned down. The top structure of it burned when I got over there. I was in town, heard the alarm, and made an inquiry. I was over at 124 Furnace Street, three quarters of a mile away. [80]

A. At that time, did you see Mr. Charles Little or Mr. Jack Little at the scene of the fire?

A. Yes.

Q. Did you have any conversation with them?

A. Yes, sir.

Q. Who else was present?

A. Oh, the fire chief was there; and there was two of the men working for me that had come across the street from getting dinner; a fellow named Brady. I recall that very distinctly.

Q. What is the name of the fire chief?

A. Getson.

Q. Did he have any conversation with Mr. Little, or did Mr. Little have any conversation with him

(Testimony of Sam Galbreath.)

at that time?

A. Yes, but I don't know what it was, sir.

Q. You weren't present during that conversation? A. No, sir.

Q. What was the fire department doing at that time with reference to putting out the fire?

A. Well, they were standing by the side of the road, but they wasn't running anything on it at the time when I arrived.

Q. Mr. Little was there at that time?

A. Yes.

Mr. Castro: Which Little is that?

The Witness: They were both there, sir. [81]

Q. (By Mr. Desmond): And did you have any conversation with them about putting water on the fire?

A. Yes. I asked them if they would, asked the Fire Chief to further distinguish it, that this oil plant was near by and I had a fear for the fire.

Q. What else occurred?

A. Well, he started running water on it again.

Q. The fire was still burning at that time?

A. Oh, yes.

Q. Now, did you see this barrel to which reference has been made, on this frame that has been identified here by Mr. Little? A. No, I didn't.

Q. Did you see the barrel at all?

A. Oh, yes; when it left the plant; when the boy was loading it at the plant, but not after it was installed.

(Testimony of Sam Galbreath.)

Q. Did you see it after the fire? A. Yes.

Q. What did you do with reference to the barrel and its contents at that time?

A. Oh, I asked one of the men to go across the track to the plant and get a gage stick and that we would perhaps be requested to pick the oil up and compensate the people for it.

Q. Now that oil—barrel of oil was near, right near the burning building, was it not? [82]

A. No, it had been moved out very near the street edge when I arrived. The fireman or some of the men working had moved it.

Q. Did that barrel have oil burn or explode?

A. No, sir.

Q. Did you measure the contents of the barrel?

A. Yes.

Q. And was a gage used for that purpose?

A. Yes, sir.

Q. Could you tell how much oil had been used?

A. There was just—it gaged 37 gallons, and our ticket showed 38 had been put in it.

Q. There had been about a gallon of oil consumed? A. Yes.

Q. It had not been burned in the fire. In other words, the oil in the barrel did not become ignited?

A. No, sir; no not to my—it showed no evidence of it.

Q. Did you or your employees have anything to do with the construction of the platform on which the oil barrel was placed?

(Testimony of Sam Galbreath.)

A. I don't know whether this boy helped to fill that or not. I haven't that information.

Q. There was no order placed for the building of that platform with you, was there? A. No.

Q. You gave no instructions concerning the building of the platform? A. No.

Q. Now, did you instruct your employees or any person employed by you to install the stove or the chimney or any parts of the stove? A. No.

Q. Had you ever sold any stoves previously to Mr. Little? A. Yes.

Q. Either for himself or for his employers?

A. Yes.

Q. Did you ever install any of those stoves?

A. Not recently. That dates back quite some time. It is possible I did in Grass Valley when he was in business there. I don't recall, and I didn't look at any record on it whether there was an installation made there or not.

Q. You sold him his stove on the 10th day of October, 1946? A. No, we didn't install that.

Q. You didn't install that? A. No.

Mr. Desmond: That is all.

Cross-Examination

By Mr. Castro:

Q. Now, what were the duties of this man Lemos with your company? A. Driving a fuel truck.

Q. What kind of a truck did he take over to the Herold Lumber Company that afternoon?

(Testimony of Sam Galbreath.)

A. One ton pickup.

Q. Did it have fuel in it? I mean oil petroleum.

A. Yes, stove oil.

Q. Did he take anything else with him?

A. A barrel and a valve, tubing, and connections.

Q. And where did he get the measurements for the tubing?

A. Well, it comes in rolls and he took a roll that comes, twenty-five feet and fifty feet, rolled.

Q. So you had some measurements before he took the roll over and unrolled it, is that correct?

A. No, it comes in standard rolls; and if he took a full roll of it, it would be either 25 or 50 feet——

Q. In other words——

A. (Continuing) ——that particular size.

Q. Your invoice shows "Tubing, 23 feet."

A. Uh-huh.

Q. Now, was that measured off at the time at your plant and cut and taken over then to the Herold plant? A. No.

Q. He took a roll over there and took 23 feet off of it? A. Yes.

Q. Now, what size oil drum did you have?

A. 55 gallon. [85]

Q. You are sure it isn't a hundred gallon oil drum? A. Positive.

Q. Do you remember being present on or about the 28th day of August, 1947, at a conversation at your place of business between Mr. John L. O'Malley who is seated in the court room back there?

(Testimony of Sam Galbreath.)

A. Yes.

Q. And Mr. Ralph Gregory—do you remember being present at the conversation between the three of you? A. Yes.

Q. At that time, didn't you and Mr. Gregory inform Mr. O'Malley that there was a hundred gallon tank? A. No, sir.

Q. Now, what are Harry Gregory's duties at your place of business? A. Driver——

Q. Anything else?

A. (Continuing) ——of a tank truck.

Q. Anything else?

A. Oh, yes; he does general work that you have for a man distributing petroleum products.

Q. Did he do anything about the installation of stoves? A. Yes, sir.

Q. In fact, that is his job there too, isn't it?

A. Partly. [86]

Q. Now, do you know how he happened to go to the Herold Lumber Company on the afternoon of the fire?

A. No, I don't. I believe he did have orders. He picked up orders to give to this other man for delivery at Newcastle.

Q. What did he have to deliver to Newcastle?

A. I don't recall—that stove oil—whether it was stove oil or gasoline. The boy had to come back to the plant then and load up.

Q. Did the boy come back to the plant then and load up? A. Huh?

(Testimony of Sam Galbreath.)

Q. Was Lemos there at the time the fire started at the Herold plant? A. No.

Q. He was where? A. Newcastle.

Q. You are sure of that? A. Positive.

Q. What time did he leave for Newcastle?

A. Oh, I don't know the exact time. I imagine it was 3:00 or 4:00.

Q. Did you see him when he left for Newcastle?

A. I saw him loading at the plant.

Q. What time was he loading?

A. Well, I don't know that exact time either, but it is only [87] a few hundred feet from where he loaded across the tracks. I would say it would be 400 feet, and he went over there to load, to fill these orders and I saw it pull out of the plant.

Q. Now that oil drum or oil container which Lemos moved over to the Herold Lumber Company, was that full or empty at the time it was taken over?

A. Empty at the time it was taken over.

Q. And did you know when it was filled?

A. After it was put on the stand, but I don't know the time.

Q. Now who had the fuel truck at the time the tank was taken over to Herold's place?

A. Lemos had it.

Q. You are sure Gregory didn't have it?

A. I have three fuel trucks and Gregory was out on the route with one of the others, but this particular truck the boy used that all day.

Q. You don't dispute the fact that it was your

(Testimony of Sam Galbreath.)

truck sitting outside of the Herold Lumber Company building at the time of the fire?

A. Well, I wasn't there. I don't know.

Q. When you came up to the fire was your truck still there? A. No.

Q. No truck of yours there? A. No. [88]

Q. Was Gregory there?

A. I can't state whether he was there or not.

Mr. Castro: That is all.

Mr. Desmond: That is all.

(Witness excused.)

Mr. Desmond: Call Mr. Cerino Lemos.

CERINO LEMOS

called for the defendants, sworn.

Direct Examination

By Mr. Desmond:

Q. Your name is Cerino Lemos?

A. Yes, sir.

Q. Where do you reside, Mr. Lemos?

A. I reside in Auburn, Placer County, California.

Q. What is your occupation?

A. Right now, I am a hospital attendant, DeWitt State Hospital.

Q. What was your occupation on October 31st, 1946?

A. Well, I was a truck driver for Mr. Sam Gailbreath?

(Testimony of Cerino Lemos.)

Q. You were employed by Mr. Gailbreath in his plant at Auburn? A. Yes, sir.

Q. Now, do you recall the day of October 31, 1946?

A. Well—on that day, Mr. Sam Gailbreath ordered me to go over to this lumberyard—oh, I don't know, I will say midday. I am not sure of the time —to take over oil, a drum, and some fittings—I guess copper tubing, and with instructions [89] that they were——

Mr. Castro: There have been no questions to him on that, your Honor.

The Court: I didn't think there was any question to him as to what the instructions were.

Mr. Desmond: Would you read the question?

(The question was read by the reporter.)

The Court: What did he tell you, that's all.

A. He asked me if I remember what took place on December——

The Court: Go ahead and tell what your employer told you.

A. Where—well, I am sorry, sir. He asked me with instructions to take the drum, stove oil, the fittings and copper tubing, and that they were the ones going to do the installation. They were just going to put up the oil—and go about my business.

Q. (By Mr. Desmond): Did you take that material to the plant of the Harold Lumber Company?

A. Yes, sir.

Q. And when you arrived, was the frame ready?

(Testimony of Cerino Lemos.)

A. No, sir, it wasn't ready, and it wasn't ready for quite a while.

Q. That's the frame that is located on the westerly side of the office at this point where it is marked on this diagram, is that correct? (Indicating.) A. Right, sir. [90]

Q. Now was someone building that frame?

A. Yes, there were some carpenters. Who they were, I don't know.

Q. And what did you do?

A. I just waited around until I got kind of tired.

Q. How long do you think you waited for them to finish the frame?

A. Well, that's all a matter of a guess now. I don't know for sure, but I will say about forty-five minutes or possibly an hour, I don't know.

Q. Now did you do anything in the meantime?

A. Yes. I crawled underneath and got the copper tubing from underneath the building while they are —that was waiting while they are building their platform for the drum.

Q. You laid out the copper tubing under the building? A. Yes, sir.

Q. And then what did you do next?

A. I remember going back into the office and asked one of the carpenters where the two by fours run underneath the floor, where they nailed the floor, so he went in, made a start from the corner of the wall and we just measured where the two by

(Testimony of Cerino Lemos.)

fours would be, so he went ahead and drilled the hole.

Q. Drilled the hole. Now what did you do next?

A. Well, I went back outside as far as I can remember, and they weren't quite completed with their stand, so I decided [91] to go underneath and poke the copper tubing up through the floor and then one of the workers in there says, "Give me a little bit more." I evidently didn't give him enough copper tubing, so he was saying, "Give me a little bit more."

Mr. Castro: Now wait. May we have that man identified, otherwise it is hearsay.

Q. (By Mr. Desmond): Do you know who that man was? A. No, sir.

Mr. Castro: I move to strike out the hearsay, your Honor.

Q. (By Mr. Desmond): When you went in the office, did you see this stove?

A. Yes, sir; uh-huh.

Q. Where was the stove?

A. Well, the best to my notion it was just about where he was, I guess.

Q. Some place over on the easterly side of the office toward the north of the building, is that right?

A. Uh-huh.

Q. And was any — were there any workmen around there? A. Lots of them.

Q. Lots of them. Do you know who they were?

A. Not a one.

(Testimony of Cerino Lemos.)

Q. You don't know them by name?

A. Don't know them by even to look at them.

Q. Were there any painters there? [92]

A. Yes, sir; there were painters there.

Q. And what were they doing?

A. Well, I don't know, but they were painting the walls, varnishing or waxing something, but they had a paint brush; in fact, I think there were two of them.

Q. Were they painting the floor?

A. Well, the best I can remember, they were painting the walls.

Q. I see; and did they have any canvas or anything on there?

A. Yes, they had a piece — well, I will say a paper on the floor so, I guess, they wouldn't get the floor dirty, I imagine.

Q. I see. Now, did you—you heard the voices up there. You don't know who it was that was speaking, do you? A. No, sir.

Q. And you pushed the copper tubing up?

A. Yes, sir.

Q. Now what did you do after that, Mr. Lemos?

A. Well, after I pulled the copper tubing out and got out from underneath the building—oh, I'll say in about ten or fifteen minutes, the stand was made and I had thrown the drum up on top of the stand, which was empty, and——

Q. You mean the drum was empty?

A. Yes, sir; and so I put on a valve. While I

(Testimony of Cerino Lemos.)

was out there I decided, well, that is, they bought the stove and what not to give them service, so I hook up the tank and I filled it up. [93]

Q. You hooked the copper tubing to the tank?

A. Yes, sir; all that same instant.

Q. And then you filled the tank up?

A. Yes, sir.

Q. And, now, do you recall how much oil you put in the tank?

A. Yes, sir. I have heard it was something like thirty-eight gallons. If I heard it this morning, I don't know.

Q. At the time you delivered the copper tubing, fittings, valves, bushings, drum and stove oil—thirty-eight gallons of oil—did you make out an invoice?

A. (Pause.)

Q. Let me show you Plaintiffs' Exhibit 3 and ask you if you made out that invoice?

A. Well, I made out this tag.

Q. Do you recall when you made it?

A. Well, I made it that day. That's my signature on the bottom there.

Q. Your initials C. L.? A. Yes, sir.

Q. That's all of the material that was delivered there? A. Yes, sir.

Q. Was there any charge made for any installations? A. No, sir.

Q. Or any labor in connection with installation?

A. No, sir. [94]

(Testimony of Cerino Lemos.)

Q. Now, after you made this connection at the barrel, what did you do next?

A. I filled the barrel up.

Q. Did you return to the inside, to the office?

A. After I half filled the barrel, yes, sir, I did go back into the office.

Q. Did you see any workmen there?

A. Yes, there was one particular. He was putting up this chimney. I asked him if he was having difficulties in putting the chimney pipe or the stovepipe through the wall. He has to head up this chimney stack or something. I didn't pay much attention because my instructions was to put the drum down there and fill it up, not to install it.

Q. In other words, these workmen were installing the pipe, the stovepipe which led from the stove to the flues? A. Yes, sir.

Mr. Castro: He said one workman. I didn't understand him to say more than one.

Q. (By Mr. Desmond): How many workmen were there, Mr. Lemos?

A. Well, if you want to be identical about it, I would say there were about two painters. This boy particularly was working on this stovepipe. That makes a total of three. And probably one of the light men, and that makes about five, guys in the middle office, so it would make about a total of seven men now. I don't know for sure and who was doing what. [95]

(Testimony of Cerino Lemos.)

Q. Now do you recall which one of these men was installing that stovepipe leading to the flue?

A. Well, I didn't quite get your question.

Q. Could you identify the man that was installing the stovepipe that was leading up to the flue?

A. No, sir.

Q. Now, could you describe—tell us how close this stove was to the wall of the office?

A. Well, that's going to be a guess. I will say in the neighborhood of eighteen inches.

Q. I see. A. Just a guess.

Q. Did you see—did you see the position of this man that was installing the stovepipe?

A. Yes, sir; he had his legs——

Q. Can you tell us just what his position was?

A. By standing up?

Q. Yes.

A. Well, he had his legs more kind of apart like this and trying to put the stovepipe in through the wall. (Indicating.)

Q. I see. Was he behind the stove between the wall and the stove?

A. Well, one leg was behind the stove. I will say maybe half his body was, one leg cocked over the copper tubing, and outside where he had his legs stretched out apart quite well. [96]

Q. Now, can you describe, Mr. Lemos, the type of connection—withdraw and strike. Can you tell us where the copper tubing that comes from the barrel is hooked on to the stove?

(Testimony of Cerino Lemos.)

A. Where it is hooked onto the stove?

Q. Yes.

A. Well, I say hooked on to the carburetor.

Q. I see; and from there it goes in the carburetor?

A. Into the carburetor and up into the——

Q. Now when you returned at that time, when you saw them putting up the stovepipe, did you notice that carburetor?

A. No, I just noticed it was hooked up so I never checked it very closely. I just didn't notice.

Q. In other words, Mr. Lemos, the copper tubing running from the oil barrel outside was hooked on to the connection on the carburetor? A. Yes.

The Court: You didn't do that?

A. No, sir.

Q. (By Mr. Desmond): Now, you didn't make that connection and you didn't put up any of the stovepipe leading to the flue, is that right?

A. No, sir; I never touched anything except like the stove in the office. That's the only thing I done.

Q. All right now, what did you do at that time?

A. Well, when they had the stovepipe all up in the air—I mean [97] it was in the place, I went back outside and I turned on the valve.

Q. That is the valve leading from the oil barrel?

A. Yes, sir; uh-huh, and well, I probably waited mainly say a minute or two until the oil came into the stove and I lit a match—lit a stove rather.

Q. You lit the stove? A. Yes, sir.

(Testimony of Cerino Lemos.)

Q. And did the stove burn?

A. Yes, sir; uh-huh.

Q. Did it burn properly?

A. To my *em*otion, yes.

Q. How long then after you lit the fire did you remain there?

A. Oh, I guess about five minutes, I guess—somewhere in the neighborhood, maybe ten; I don't know, I don't think much more.

Q. What happened next?

A. Harry Gregory came up to the lumber yard and asked and told me there were two customers down at Newcastle that wanted fuel, so he told me to leave so I just practically left that instant, back to the plant to load up the truck and go down to Newcastle and San Francisco, those two customers.

Q. I see, and at the time you left, was the fire burning properly in the stove?

A. Yes, at the time I left; yes, sir.

Mr. Desmond: That is all, your Honor. Just a moment——[98]

Q. Now, were you the only person in that lumber yard or in that office and about those premises during the time that you have described that was an employee of Sam Gailbreath?

A. I don't quite get it.

Q. All right. During the time that you arrived there to deliver the oil, were you the only employee, were you the only person there who was an employee of Sam Gailbreath?

(Testimony of Cerino Lemos.)

A. Yes, I was the only one until about five minutes and Harry Gregory was with me—maybe not that long, maybe three minutes, I just left instantly.

Q. Did the carpenter or whoever drilled that hole, was he an employee of Mr. Gailbreath?

A. No, he wasn't. I was the only one there, sir.

Q. All right now. Was the man that you saw putting the chimney up, going up from the stove to the flue, is he an employee of Mr. Gailbreath?

A. No, sir.

Q. Did you see any employees of Mr. Gailbreath do any work around or about that stove other than yourself? A. No, I never did.

Q. And during all this time the painters were applying this paint, whatever it was?

A. Whatever it was; yes, sir.

Mr. Desmond: That is all. [99]

Cross-Examination

By Mr. Castro:

Q. How old are you?

A. I am twenty-six.

Q. How long did you work for Mr. Gailbreath?

A. Oh, I will say three months, maybe not quite, maybe two and a half months or three.

Q. Was that before or after the fire?

A. Well, I started before and I quit after.

Q. How long after?

A. Month and a half, I don't know.

Q. Now this hole that was drilled——

A. Uh-uh.

(Testimony of Cerino Lemos.)

Q. ——did you ask the carpenter to drill it?

A. I asked him where these two by fours run underneath the floors—flooring. He went and drilled it.

Q. You didn't tell him to? A. No, sir.

Q. Didn't indicate to him you wanted to put tubing through that?

The Court: What is that? I didn't quite get that. You wanted to put tubing through the hole for him to drill?

A. That I don't know. I went back underneath. I hooked it all through, so I did it on my own accord.

Q. (By Mr. Castro): Now did you talk to anybody out there about poking tubing through and that you were going to poke it through and for them to take it as it came through? [100]

A. No, I don't remember talking to anybody. I remember saying—someone up on top saying, "Give me a little bit more."

Q. What did that man look like?

A. Gentlemen, I don't know.

Q. Did you see him?

A. Sure I seen him but I don't know what he looks like today.

Q. Know his name? A. No, sir.

Q. Do you know how he was dressed?

A. Looked like he was dressed in—I don't know. He just had clothes on. I don't remember, sir. I really don't know how he was dressed.

(Testimony of Cerino Lemos.)

Q. A young man or an old man?

A. Gentlemen, I lost the picture of his face entirely.

Q. Was he a heavyset man or a slender man?

A. I still don't know. I can't—I really don't know.

Q. A tall man or a short man?

A. I don't know, sir.

Q. Now were you there at the time the fire started? A. No, sir.

Q. Were you over at the Gailbreath plant at the time the fire started? A. No, sir.

Q. Did you see the fire at all? A. No, sir.

Q. Now, isn't it a fact that when Harry Gailbreath came there he had to reconnect this tubing and so-called carburetor that you have referred to?

A. I don't know. I never seen Harry touch the stove at all. Of course, I was there with him just a matter of two or three minutes, or five minutes.

Q. Isn't it a fact that Harry Gregory was there for about two and a half to three hours before the fire?

A. Well, that I don't know. I don't just—I don't know whether he, when the fire started, took off or anything.

The Court: What time did you leave?

A. Well, I'd say it was a little after four in the afternoon to go to Newcastle and deliver my two deliveries.

(Testimony of Cerino Lemos.)

Q. (By Mr. Castro): And what time did you get there? A. Pardon?

Q. What time did you reach there?

A. Newcastle?

Q. No, Harold Lumber Company. What time did you arrive at Harold Lumber Company?

A. Oh, God I don't know. You mean in the morning? I didn't quite understand your question.

Q. What time did you get to Harold Lumber Company that day?

A. I don't know; just right after lunch.

Q. You were there from that time until four o'clock?

A. Yes, something in the neighborhood. [102]

Q. Harry Gregory was not there during any of that time?

A. He was now—well, see, I don't know exactly the time I left but he was there, well say about three minutes before I left, so I got there maybe a little after four, I don't know.

Q. Have you ever installed a heater of this type?

A. Yes, I installed one over at, well, call it the Indian Wolf Routings.

Q. Was that before or after this fire?

A. Before.

Q. How long before?

A. Oh, God I don't know; maybe two weeks, three weeks.

Q. Did you have Harry Gregory help you on that job?

(Testimony of Cerino Lemos.)

A. No, sir; he never was around.

Q. Do you know the size tank that was set up on that stand outside the building?

A. Yes, it was one of those 53 or 55 gallon tanks —one of those little tanks.

Mr. Castro: No further questions.

Mr. Desmond: Mr. Lemos, do you recall——

Mr. Castro: May I ask one or two further questions if you don't mind?

Mr. Desmond: Go ahead.

Q. (By Mr. Castro): Now that man that you claimed worked on the chimney or the stovepipe, can you describe him? A. No, sir. [103]

Q. What he looked like?

A. I don't know, sir.

Q. Whether he was an old man or a young man?

A. I can't sir. I don't know the picture of the character.

Q. Whether he was dressed in any particular way?

A. Well, I don't know. I don't know. I am not going to say something I am not sure.

Q. Who was in there at the time he was fixing the so-called chimney? A. Pardon?

Q. Who was in there at the time he was fixing the so-called chimney setup?

A. Oh, I don't know, was around five or six guys, a lot of people around.

Q. Name them.

A. I don't know any of them, sir.

(Testimony of Cerino Lemos.)

Q. Was Jack Little there?

A. I don't know him either.

Q. Did you see either one of those gentlemen that are identified as Charley or Jack?

A. They possibly was there but I don't know.

Q. Did you see them?

A. If I did, I know I didn't know who they were.

Q. You say there were two men painting?

A. Yes. [104]

Q. What did they look like?

A. I don't know—looked like men to me.

Q. Old or young men?

A. I don't now, I can't——

Q. Can you describe their physical shape in any way? Were they tall or short, heavy or slim?

A. They were just men. That's all I know. I never paid any attention to them.

Q. Did you hear any names?

A. No, sir; I don't know.

Mr. Castro: No further questions.

Redirect Examination

By Mr. Desmond:

Q. Do you know a man by the name of Glenn Carns? A. No, sir.

Q. Now, do you recall that night what time you returned from Newcastle making those deliveries?

A. I would say between 6:15 and 6:30. I don't know for sure but it was after 6:00.

Q. And that was after the fire?

(Testimony of Cerino Lemos.)

A. Yes, sir; uh-huh.

Q. And you left there when Mr. Gregory gave you these instructions to make the delivery to Newcastle—it was around 4:00 o'clock?

A. Well, a little after four maybe, around four like. [105]

Q. And where did you go then?

A. I went back up to the plant and loaded up, sir.

Q. Do you know what you loaded your truck with?

A. Stove oil if I recall myself correctly what I loaded up with—stove oil for the both customers.

A. And, do you know how many gallons you put in?

A. I think I put a full tank, three-hundred and —I don't know how much the tank holds, some three-hundred gallons, I guess.

Q. Then you drove that truck and loaded fuel oil down to Newcastle? A. Yes, sir.

Q. And that is how far from Auburn?

A. I don't know. Three miles, I guess—three and a half, four, I don't know.

Q. You made the deliveries there?

A. Yes, sir.

Q. How many deliveries did you make?

A. Two, sir.

Q. And then you returned to Auburn?

A. Yes, sir.

Mr. Desmond: I think that is all.

Mr. Castro: No further questions.

The Court: That is all.

Mr. Desmond: Call Lars Wold, your Honor.

LARS WOLD

Called for the defendants, sworn.

Direct Examination

By Mr. Desmond:

Q. Your name is Lars Wold?

A. Yes, sir.

Q. Where do you live, Mr. Wold?

A. Auburn.

Q. What is your work? A. Contractor.

Q. Contracting builder? A. Yes, sir.

Q. How long have you been engaged in that business? A. About two and a half years.

Q. And did you construct the building that has been referred to as the office and lumber yard of the Harold Lumber Company in Auburn?

A. Yes, sir.

Q. And you were the contractor on the job?

A. It was a percentage job.

Q. Now, did you employ any painters around the place? A. No, sir.

Q. Who employed the painters?

A. Charley Little.

Q. Charley Little? A. Yes, sir. [107]

Q. Do you recall the day of October 31, 1946, day of the fire? A. The day of the fire?

Q. Were you about the premises on that day?

(Testimony of Lars Wold.)

A. I was there in the afternoon and after the fire started.

Q. You were there in the afternoon after the fire started? A. Yes, sir.

Q. Now, did you have occasion to go into the office that day?

A. I went through the office.

Q. Were there any painters working there?

A. Yes, sir.

Q. Were they your employees?

A. No, sir.

Q. Whose?

A. They were Mr. Little's employees. Well, Charley said they were a couple of Okies, that's the expression.

Q. And that was about what time in the afternoon?

A. I would say around—oh, between one and two, I am not positive.

Q. Do you know what they were doing?

A. Sir? They were painting, but I am not sure.

Q. Do you know what sort of paint they were using? A. Standard Oil hardener.

Q. Where were they applying it?

A. Where? [108]

Q. To what part of the office were they applying it?

A. I am not sure. I think it was the walls. He had the floor all painted in.

Q. What do you recall about the floor?

(Testimony of Lars Wold.)

A. He had boards. We had to walk on boards there so we wouldn't take the stuff up.

Q. So you wouldn't track the paint?

A. Yes, sir.

Q. And the paint on the floor was wet, was it?

A. Yes, sir.

Q. And the paint on the walls was fresh and wet?

A. It was applied within that day or the day before.

Q. Now, do you what—do you know anything about this material Standard Oil floor hardener?

A. It's inflammable.

Mr. Castro: We object now to the question on the ground that no proper foundation was laid, your Honor, as to this man's qualifications as to this material.

The Court: Sustained.

Q. (By Mr. Desmond): Have you had considerable experience with paints and varnish?

A. Not so much. I always hire painters for that.

Q. Are you familiar with this particular material? A. Not too much.

Q. I see. All right. Now, Mr. Wold, did you install the flue? [109] A. Yes, sir.

Q. Will you describe to the Court, please, what that flue is and where it was in connection with the building?

A. It had a terracotta lining. We had aluminum

(Testimony of Lars Wold.)

casing on it because we couldn't get the metal. The metal was hard to get and we had aluminum casing on it but it is a patent flue. It passes inspection.

Q. Now that flue, where did it begin with reference to the building?

A. I would say, well, twelve inches at the top and the hole was twelve inches from the ceiling. That's the least we can get by with and we couldn't get it lower, we didn't want to bump heads.

Q. In other words, the outlets from the stove were——

A. The top of the outlet was twelve inches from the ceiling.

Q. It was up close to the ceiling, in other words?

A. Yes.

Q. And was there—did that flue extend through the wall? A. Through the wall.

Q. Then where did it go?

A. Up through the roof.

Q. Up through the roof?

A. Yes, it comes into a "T" and goes up through the roof.

Q. Did you have a permit for installing that flue? A. Yes, sir. [110]

Q. Now, did you see the stove to which reference has been made?

A. I seen the stove that afternoon when I went through.

Q. And, will you tell us, please, how close the stove and the pipe heading of it was from the wall?

(Testimony of Lars Wold.)

A. Well, I would say it was between twelve and twenty-four inches.

Q. And was that an open pipe leading from the stove to the flue? A. I didn't notice no pipe.

Q. I see.

Mr. Desmond: That's all. Oh, one further question, your Honor. You may rule me out of order but may I ask the question?

Q. Did you have a permit for the construction of this building? A. Yes, sir.

Q. What was it—what value was the permit granted?

Mr. Castro: Objected to on the ground that it is irrelevant, incompetent and immaterial.

The Court: Sustained.

Mr. Desmond: That is all.

The Court: Do you know who connected this stove up, the flue? A. No, I do not.

The Court: Did you give any direction to any of your men to do it? [111]

A. No, I had nothing to do with installing stoves.

The Court: As far as you know, none of your employees did it?

A. No, sir. They have orders not to touch anything in that.

Cross-Examination

By Mr. Castro:

Q. Now what time of the day did you get there on the date of the fire?

A. I will say between twelve and one, around

(Testimony of Lars Wold.)

between twelve and one. I am not exactly sure of that.

Q. Did you see this Mr. Lemos there?

A. I seen a fellow that looked like him. I am pretty sure it was him.

Q. Where did you see him? A. Sir?

Q. Where did you see him?

A. He was right in the office at the time.

Q. What was he doing?

A. I don't know. He wasn't doing anything when I passed through there.

Q. Did you see him doing anything with tubing?

A. With what?

Q. With tubing.

A. No, he was installing tubing but I didn't see him doing it.

Q. You say you know he was installing it but you didn't see him doing it? [112]

A. The thing was underneath the building there.

The Court: How about up in the office, was he installing any tubing up there in the office?

A. Well, it came through the floor.

The Court: Was he up in the office?

A. He was in the office, yes, sir.

The Court: He was?

A. He was in the office.

The Court: Did you see him with the tubing while he was in the office?

A. Well, I didn't see him working on it.

Q. (By Mr. Castro): Did you see him doing

(Testimony of Lars Wold.)

anything with the stove while you were in the office?

A. No, I wouldn't see that. Didn't see him doing anything with the stove.

Q. Who else was in the office at that time?

A. I don't remember anybody being there except the painters. They were working in there.

Q. What were their names?

A. I don't know them.

Q. Do you know a man by the name of James France?

A. I don't know their names. I had nothing to do with them. They were hired by Charley Little.

Q. Now, had they painted in the office previous to the day of the fire? [113]

A. The day before and that same day.

Q. Do you know what they painted the day before?

A. Painted the walls and the floor, the ceilings and the floor. They were very near through that day if I remember right on that, but I know they were still painting the two days.

Q. Do you know where about in the room they were painting when you were there between one and two o'clock? A. No.

Q. Do you know whether the counter was in the room? A. Yes, sir.

Q. And do you know whether they were painting between the counter and the side of the building?

A. I don't believe they were, because——

Q. Do you know? A. I don't believe so.

(Testimony of Lars Wold.)

Q. Do you know whether they were painting the front portion of the counter?

A. They were painting on the counter and they painted that day because we hadn't had it finished that day before, so I know they had to paint the counter that day.

Q. But the day before, you think they painted the walls and the ceilings?

A. The boards, you say?

Q. The walls and the ceilings.

A. The walls. [114]

Q. And the floor?

A. And the floor. Everything had that Standard Oil hardener on it.

Q. Did you help them move the desk in?

A. No, it was built right there.

Q. You say the desks were moved in?

A. No.

Q. Were the desks built into the floor?

A. We built the counter but the desk was moved in. They were oak desks, I think.

Q. Did you see any paper covering on the floor?

A. I don't remember paper but I know we walked on boards.

Q. Well, the floor was made out of boards?

A. Yes, the floor was made out of boarding, one by twelve, so we wouldn't track dirt on the things.

Q. Now, did you feel the floor hardener to see whether it was dry yet? A. No, I didn't.

Q. Do you know whether it was dry or wet?

(Testimony of Lars Wold.)

A. I know it was wet because they were just applying it.

Q. You told me they painted the floor the day before.

A. I don't know anything about the floor. I didn't try it then.

Q. Do you know whether it was dry or wet?

A. It takes twenty-four hours for that stuff to dry. [115]

Q. Do you know what time they finished painting the floor the day before?

A. No, I had nothing to do with painters.

Q. Do you know whether they painted the ceiling or the floor first?

A. They did the ceiling and the floor. I don't know which one they painted first.

Q. Now this flue that was put in—you got a permit for it? A. Yes, sir.

Q. Did you get a permit to put in the stove?

A. I had nothing to do with the stove.

Q. Was the flue put in in proper condition?

A. Yes, sir. It was installed and passed.

Q. Passed by the inspector? A. Yes, sir.

Mr. Castro: No further questions.

Mr. Desmond: That is all, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Miller: Mr. Gregory, will you take the stand and be sworn?

If your Honor please, may I ask at this time that Mr. Wold be excused, unless counsel has anything further?

Mr. Castro: We have nothing further.

The Court: All right. [116]

HARRY L. GREGORY

Called for the Defendants, sworn.

The Clerk: And your full name, sir?

A. Harry Lesly Gregory.

The Clerk: Will you take the stand, please?

Direct Examination

By Mr. Miller:

Q. Your name is Harry Gregory?

A. Yes.

Q. And, Mr. Gregory, where do you live?

A. Auburn.

Q. How long have you lived at Auburn?

A. About eleven years.

Q. By the way, calling your attention to October 31, 1947——

The Court: '46.

Mr. Miller (Continuing): ——'46, that's right—pardon me—who were you employed by at that time? A. Mr. Galbreath.

Q. Mr. Galbreath? A. Yes.

Q. And that's Sam Galbreath, is that correct?

A. That's right.

Q. Now were you working at the plant he operated, the Signal Oil Plant on that day? [117]

(Testimony of Harry L. Gregory.)

A. Yes, sir.

Q. Working in and out of there, is that correct?

A. Uh-huh, that's right.

Q. And for the purpose of the record, you had worked for Mr. Galbreath before that time, hadn't you, before that day? A. Yes.

Q. About how long, do you know?

A. I have worked for Mr. Galbreath for about four and a half years, about that.

Q. Uh-huh. A. Four or four and a half.

Q. Now, on the day in question, October 31, 1946, and calling your attention specifically to the afternoon of that day, did you have an occasion to go over to the Herold Lumber Company?

A. Well, I was coming in from making some deliveries and I knew about these other deliveries, so I stopped and told Mr. Lemos to go out and make the deliveries and——

The Court: What time of the afternoon was that?

A. Well, I couldn't say just exactly what time it was.

Q. About?

A. Well, I imagine it was around two or three o'clock.

The Court: Proceed.

Q. (By Mr. Miller): Was it after—well, all right. Now, did you say you told Mr. Lemos something? [118]

A. Yeah.

(Testimony of Harry L. Gregory.)

Q. What did you tell Mr. Lemos?

Mr. Castro: Objected to as hearsay.

Mr. Miller: All right.

Q. Where did you first see Mr. Lemos when you went to the plant? A. I didn't go to the plant.

Q. Well, I mean to the Herold Lumber Company, where did you first see him when you stopped there? Do you recall where he was with respect to the building?

A. I think he was just outside of the door and —no, he was inside; that was it.

Q. He was inside the building proper?

A. Yes.

Q. What—strike and withdraw. Did you stop in front of the building at the Herold Lumber Company?

A. Just up the road on the right-hand side.

Q. Did you go in the building?

A. Yeah, I went in the building.

Q. Then you saw Mr. Lemos, is that right?

A. That's right.

Q. What was he doing?

A. Well, they were getting ready to light the stove.

Q. Did he light the stove or—— A. Yes.

Q. Were you there?

A. Yes, I was there. It was just lit just as I came in.

Q. It was lit as you came in?

A. That's right.

(Testimony of Harry L. Gregory.)

Q. Did you light the stove or have anything to do with the lighting of it? A. No, sir.

Q. You are sure of that are you?

A. I am sure of that.

Q. All right, was the stove burning?

A. It was burning, yes.

Q. Was it burning when you first looked at it?

A. Yes.

Q. All right, now, did Mr. Lemos stay there, or what happened?

A. No, he left in about, oh, I imagine about five minutes.

Q. In about five minutes? A. Yes.

Q. Now, calling your attention to the time you first came in the room or the office of the lumber company and when you state you noticed the stove was burning, and from the time Mr. Lemos left, or whatever space of time that was, was the stove burning during that period? A. Yes, sir.

Q. Was it burning normally or naturally?

A. Yes, it was burning all right. [120]

Q. Uh-huh. Now, did you have a conversation with Lemos before he left?

A. No only just that I told him that there was some deliveries to be made.

Q. Uh-huh. Then he left, is that it?

A. Yes, that's right.

Q. Now, after he left, did you stay there a little while? A. Oh, about a half hour.

Q. About half an hour?

(Testimony of Harry L. Gregory.)

A. It might have been a little longer.

Q. Pardon me, I thought you had finished your answer. A. Yeah.

Q. Then, where did you stay, inside the office of the lumber company or outside?

A. I stayed around there for quite a little while, yes, and——

Q. Well, now, did a fire occur? A. Yes.

Q. What first called your attention to a fire?

A. Well, I was standing by the door when the fire took place.

Q. By what door were you standing——

A. Well——

Q. ——with respect to the front or the back or west, east, north or south?

A. There is only one door that I know of and that's on the [121] south side.

Q. South side? A. Yes.

Q. This diagram, if you see what we have here. The top of the board is north. This is west, south and east. (Indicating). And you are referring to the door here by the south side?

The Court: That would be on the east side there.

Q. (By Mr. Miller): You said the north or south side? A. Where you got your finger?

Q. Yes, down here. And were you standing at that door then when you first had it brought to your attention that there was a fire in the building?

A. Yes, that's right.

Q. Now, will you tell the Court what you first

(Testimony of Harry L. Gregory.)

observed, how you first knew that there was a fire; will you tell his Honor that?

A. Well, I was standing there at the door and I happened to look back and the fire was going up the wall. That's about all I could tell you, but I saw it.

Q. Did someone call it to your attention or holler, or did you observe it yourself?

A. No, I just happened to turn around and I saw the fire.

Q. All right, now, it was burning on the wall, is that your testimony? [122]

A. That's right.

Q. What wall would that be, the one near the stove or the other one?

A. In back of the stove, above the stove is where I saw the fire.

Q. You saw the fire burning back and above the stove, is that right? A. That's right.

Q. Was anybody else in the building at that moment that you recall?

A. There was some fellows in there. I don't know who they were. I never saw the men before.

Q. Were they in the building itself?

A. Yeah, they were in there, yeah.

Q. What did you do after you saw the fire on the wall?

A. There was a coat on the bench there, on that counter, and I naturally was going to try to save something if I could, and I grabbed for the stove

(Testimony of Harry L. Gregory.)

and it tilted over a little bit but it was so hot on the back of it that I couldn't stand it. I had to get out of there.

Q. Then did you leave the building?

A. Yeah.

Q. Where was the fire burning then?

A. It was all up over the top of the ceiling and down it went right on over and down. [123]

Q. Now, when you first looked back and saw the fire, when you first noticed the fire, you said it was burning on the wall, is that correct?

A. That's right.

Q. Was the floor on fire then at the time——

A. No, sir.

Q. ——you first saw it? A. No, sir.

Q. One thing we overlooked: From the time you first arrived there up until the time you left, did you do anything towards installing the stove or adjusting it? A. No, sir.

Mr. Miller: That's all.

Mr. Castro: Just a moment, please, counsel.

Q. (By Mr. Miller): Now, at any time with respect to this particular stove that was delivered by your employer Mr. Galbreath, did you have anything personally to do with the delivery of the stove, the repair, the installation of the stove itself, or anything connected with it, or the drum?

A. No, I didn't.

Q. (By the Court): And you didn't light it?

A. No. I didn't light it.

(Testimony of Harry L. Gregory.)

Cross-Examination

By Mr. Castro:

Q. You are still working for Galbreath?

A. Yes, sir. [124]

Q. What is your job?

A. Delivering stove oil and gasoline and installation work.

Q. Who installs stoves at Galbreath's?

A. I do mostly.

Q. Anybody else? Is there anybody else there installs for Galbreath? A. No.

Q. Was there on the day of the fire?

A. No.

Q. Was Lemos learning how to install stoves at the time?

A. Well, he has already installed stoves before that.

Q. So he had installed stoves and you had installed stoves on the day of the fire?

A. That's right.

Q. Now, had he done anything to install this stove at the time you arrived at the Herold Lumber Company? A. I don't know.

Q. What time did you get there?

A. Well, I don't know. It was around three o'clock, maybe a little later.

Q. How much? A. I couldn't say exactly.

Q. Approximately?

A. Three thirty or four.

Q. And you remained there how long? [125]

(Testimony of Harry L. Gregory.)

A. About a half hour.

Q. What time did the fire take place?

A. Well, I couldn't tell you.

Q. (By the Court): What were you doing there that day at all?

A. Well, we sold the stove to these people and naturally I was just trying to be—to stay there and take care of things in case there was anything ever would happen to it.

Q. Were you apprehensive anything was going to happen to it? A. No.

Q. Did you do anything in connection with it?

A. No, I didn't.

Q. You just stood there?

A. I just stayed there. That was all.

Q. (By Mr. Castro): Did you see Mr. Jack Little there, this gentleman that is seated back here? Will you stand up?

(Mr. Jack Little stood up.)

A. I don't remember him, no.

Q. Was anybody in the room at the time the fire started except yourself?

A. There was some fellows there but I don't know them. I never saw the fellows before in my life.

Q. How many?

A. I don't know exactly just how many there was in there.

Q. How were they dressed? [126]

A. Well, work clothes, I imagine.

(Testimony of Harry L. Gregory.)

Q. (By the Court): Did you inspect it to see whether it was connected up properly?

A. No.

Q. I can't understand why you would be there just to see if anything happened. Did you inspect to see if it was all right?

A. I knew that Mr. Galbreath sold them the stove and I thought maybe I would just stay there until—and see if there was anything—if there was anything went wrong with the thing.

Q. But you didn't look——

A. I went around the stove, yes, but I didn't see anything wrong with it at all.

Q. (By Mr. Castro): Do you know what caused the fire? A. No, I don't.

Q. Now, *isn't a* fact that you had been there approximately two and a half to three hours at the time of the fire?

A. No, I couldn't have been there that long.

Q. Isn't it a fact that when you arrived there, Lemos had started connecting up that stove and you took it over from him?

A. No, I don't know anything about what Lemos done.

Q. Isn't it a fact that you took over and did it, reconnected it yourself? [127] A. No.

Q. Isn't it a fact that you smelled this new paint that was in the room?

A. There was paint over in there, yeah. It was just freshly painted.

(Testimony of Harry L. Gregory.)

Q. Do you usually light these stoves when you smell paint?

A. I don't know. That was the first time that I had ever had anything like that happen.

Q. Isn't it a fact that you don't put stoves in when there is fresh paint in a room?

A. Well, I don't know whether they do or not.

Q. Isn't it a fact that it has been the practice there not to put stoves in and light them in a room where there is fresh paint till that paint has dried out?

A. Well, that's the first time I have ever had anything like that happen.

Q. All right. Now, you say you did not light the stove? A. No, I didn't.

Q. Isn't it a fact that you turned on the oil and let it run for a couple of seconds and then looked at it with your flashlight and then threw the lighted match in there?

A. No, I didn't do that.

Q. You didn't do that? A. No.

Q. Are you sure you stayed there for a half hour, however? [128] A. Just about a half hour.

Q. You did nothing?

A. I didn't do a thing, no.

Q. You did grab the stove, or the coat, some coat that you picked up?

A. There was a coat on the desk there.

Q. And then did you drop the stove?

A. I just turned loose of it.

(Testimony of Harry L. Gregory.)

Q. Did the stove turn over and the oil spill out?

A. I don't think it turned clear over. It was kind of leaning.

Q. Do you remember talking to Mr. John O'Malley? A. Yes, sir.

Q. Where did that conversation take place?

A. In front of my house.

Q. Who was present? A. Mr. Galbreath.

Q. And at that time, did Mr. O'Malley ask you whether you had connected this stove?

A. I think he did, yes.

Q. What did you tell him?

A. Well, I am not sure as to what I did tell him at the time.

Q. Isn't it a fact that you told him that the stove had been uncrated by some other person and someone had commenced to install it when you arrived there and that you completed the installation by setting it up properly, connecting the tubing from [129] the tank to the stove underneath the flooring, did you tell him that?

A. I don't know whether I told him that or not.

Q. Now, didn't you tell him that you had smelled the new paint in there at the time you did this installation?

A. Well, it smelled like there was new paint in there all right.

Q. Didn't you tell him where there was new paint you usually don't light the stove?

A. I don't remember telling him that.

(Testimony of Harry L. Gregory.)

Q. Now, didn't you tell him you were there about two and a half or three hours in the course of the installation of that stove?

A. No, I don't think I told him that at all.

Q. Isn't it a fact that you turned on the oil—you told him that you turned on the oil after the tubing and stove had been connected, and watched it flow for a couple of seconds and used a flashlight to look into the stove to see that the oil was in the pot?

A. I don't know what Mr. O'Malley wrote down there.

Q. I am asking you what you told him.

Mr. Miller: I object——

Mr. Castro: He has a right to answer the question.

The Court: That is not an answer to the question. The question: Did you tell him then or did you not? [130]

A. No, I didn't.

Q. (By Mr. Castro): And did you tell him you ignited that by throwing a lighted match?

A. No.

Q. And did you tell him you were the only employee of Galbreath on the premises?

A. No.

Mr. Miller: Just a moment, may I see that? May I see it, counsel?

Mr. Castro: Yes.

(Testimony of Harry L. Gregory.)

(Mr. Castro shows a two-page document to counsel.)

Mr. Castro: You can read it if you want to.

Q. At the time Mr. O'Malley talked to you, did he take any notes in writing? A. Yes, he did.

Q. Is that your signature? (Showing document to witness.) A. Yes, that's my signature.

Mr. Castro: May I have it marked, identified as plaintiffs' next in order?

The Clerk: Plaintiffs' 4 for identification.

Q. (By the Court): Was there any writing on the paper at the time you signed it?

A. It was on there, yes. I didn't read it over.

Mr. Miller: Let's see it again, will you, counsel?

(Mr. Castro shows document to Mr. Miller.)

Q. (By Mr. Castro): Also in pencil, here is the name Harry Gregory. Is that your writing?

A. No.

Q. Or is this printing on the front side yours?

A. No, I don't think so.

Mr. Castro: No further cross-examination.

Mr. Miller: That's all, your Honor.

The Court: All right, call the next one.

Mr. Miller: Call Mr. Galbreath.

SAM GALBREATH

Recalled by the defendants. Previously sworn.

Direct Examination

By Mr. Miller:

Q. Mr. Galbreath, how long have you been engaged in the business of selling this type of stove?

A. A little over ten years; between ten and twelve years.

Q. And have you installed a number of these stoves? A. Yes, many of them.

Q. And have you observed their operation?

A. Yes, sir.

Q. What sort of a flue is necessary? What sort of a pipe is necessary to go from the stove to the flue?

A. Ordinary stovepipe like that is commonly used.

Q. Is it necessary to have a damper?

A. Oh, yes. [132]

Q. Let me show you this piece of pipe and ask you if that is the type of pipe that extends from the stove toward the flue?

A. Yes, sir; uh-huh, there is many different ones, sir. However, that is one particular type.

Q. This is the ordinary—what would you call this, a tee? A. Yes, sir.

Q. Now at the bottom of this tee is a damper——

A. Uh-huh.

Q. (Continuing): ——or a metal object that fits into the end of the pipe? A. Yeah.

(Testimony of Sam Galbreath.)

Q. And in the installation of this type of stove, is it necessary to have this pipe and damper extending from the stove to the flue?

A. Oh, yes; uh-huh.

Q. What is the purpose? Would you explain to the Court, please, how this damper works? Is it automatic or what?

A. By turning this thing here, you can adjust that where it will stand open; or screw it down there and it will likely stay closed, depending on the draft that you have up here in the flue. The heat rises, of course, and the cold air drops. If you are taking air for circulation back from the room, of course, when this is in operation, it makes it more economical and a better operation in general.

Q. Does that damper affect the amount of heat in the stove? [133]

A. Oh, yes. Oh, yes, it affects the distribution of the heat.

Q. Did you deliver or sell to the lumber company that day any of those pipe connections or any of those dampers? A. No, sir.

Q. Now, did they ask for them? A. No.

Q. What is the effect upon the heat in the room if that damper is not attached to the stovepipe?

A. Well, that would largely depend on the suction of your flue. If your suction——

Mr. Castro: Your Honor, we are going to object to this as irrelevant, incompetent, and immaterial, unless there is some showing as to the efficiency of

(Testimony of Sam Galbreath.)

a damper; so whatever they have relation to on this tee which he has in his hands, your Honor——

The Court: Overruled. Go ahead.

The Witness: You asked what effect it would have?

Q. (By Mr. Miller): Yes.

A. Well, if this was closed—or this wasn't on the pipe, your heat would go in the top part of your stove and it would go up into your pipe. It would come up and have a tendency to rise. If this was too large and you didn't have sufficient draft, the heat would have a tendency to be in the bottom of the stove and wouldn't raise enough [134] to give you sufficient heat. The purpose of this is a balance between the mixing of the air, see? Not the air through your stove, but to control the pull. The air enters at the bottom, of course.

Q. I see; and if that damper were not on the pipe, were not properly installed, would the pipe above the stove become hot?

A. Yes, depending on the strength of the flue. It would become extremely hot if the flue was very strong. It would go up maybe three or four joints, of extreme heat.

Q. In other words, it would depend upon the height of the flue and what draft was created from the outside air on the flue, is that right?

A. Yes, that's right.

Q. In the installation of the type of heater sold,

(Testimony of Sam Galbreath.)

it is necessary to have this valve on it, is that correct? A. Yes.

Q. In order that the stove works properly?

A. Yes, sir; they should have them.

Mr. Miller: I would like at this time, your Honor, to introduce this pipe and damper as Defendants' Exhibit.

The Court: All right.

The Clerk: Defendants' Exhibit A.

(The pipe and damper referred to were received in evidence and marked Defendants' Exhibit A.) [135]

Q. (By Mr. Miller): Have you ever seen stovepipes get red from the heat? A. Oh, yes.

Q. Where did you see them get red, Mr. Galbreath?

A. Oh, many different places. The last occurrence was Grass Valley.

Q. On this same type of stove?

A. Yes; at Folsom or Grass Valley—Newcastle.

Q. That is due to overheating?

A. No, it's rectifying—by rectifying the draft from the room.

Q. That is taken care of by this valve, is it?

A. Yes.

Mr. Miller: That is all.

(Testimony of Sam Galbreath.)

Cross-Examination

By Mr. Castro:

Q. Does the stove have a damper with it when it is sold?

A. Some makes of them, and some haven't. Recently, they haven't been coming equipped with them. They had to stop this during the recent war.

Q. This was part of the standard equipment that was to go with the Customaire stove that you sold the Herold Lumber Company?

A. No, not that. If it had one of those, it's in the crate with the stove; but this is the particular type that is used. [136]

Q. Do you know whether or not there was one on the stove there at the Herold Lumber Company?

A. No, I don't know.

Q. (By the Court): You say there was none?

A. I don't know, sir.

Q. You don't know.

Mr. Castro: I move to strike the testimony as irrelevant, immaterial and incompetent as to that flue and damper.

Mr. Miller: If your Honor please, the testimony is that he had nothing to do with this. He sold no pipe to them.

Mr. Castro: He said it came in a box.

The Court: If it is there. He doesn't know whether one of those went with the stove.

The Witness: That's right.

(Testimony of Sam Galbreath.)

The Court: That is the way I understood the testimony.

The Witness: If there was one in the crate, I don't know.

Q. (By Mr. Miller): Let me ask this: Are these pipes and dampers customarily sold separately from the stove?

Mr. Castro: Objected to as incompetent, irrelevant and immaterial. They are supplyable by the suppliers.

The Court: Overruled.

Mr. Miller: Well, may I inquire as to the practice? [137]

Q. (By Mr. Miller): Is this a part of the purchase of the stove? A. No.

Q. It is separate entirely from the stove, is that correct?

A. Yes. If the stove comes equipped with one, naturally they don't need to make the additional purchase of that little air valve.

Q. (By the Court): Now, you said that you sold the stove and it was crated at the time you sold it? A. Yes, sir.

Q. And you don't know whether this damper was included in that? A. No, sir; I don't.

Q. (By Mr. Miller): You didn't sell any pipe?

A. No pipe.

Q. And you didn't install any pipe——

Mr. Miller: This is based on the testimony of Mr. Lemos.

The Court: The testimony goes out in reference to the damper.

Mr. Miller: That is all.

Mr. Castro: No questions.

Mr. Miller: That is all we have to offer, your Honor.

Mr. Castro: Call Mr. O'Malley. [138]

JOHN L. O'MALLEY

Called by the plaintiffs on rebuttal, sworn.

By the Clerk:

Q. What is your first name, Mr. O'Malley?

A. John L.

Q. Thank you.

Direct Examination

By Mr. Castro:

Q. Where do you reside, Mr. O'Malley?

A. San Francisco.

Q. How long have you lived there?

A. Six years. [139]

Q. And what is your occupation?

A. Investigator for Swett and Crawford Insurance Company.

Q. And where are they located?

A. 100 Sansome Street, San Francisco.

Q. Now, on or about the 27th day of October, 1947, were you employed as an insurance adjuster by Swett and Crawford? A. I was.

Q. And did you receive an assignment concerning this fire at the Harold Lumber Company?

(Testimony of John L. O'Malley.)

A. I did.

Q. And in response to that assignment, where did you go?

A. To the town of Auburn, California.

Q. And while there, did you meet a Mr. Harry Gregory? A. I did.

Q. And he is the man that preceded you on the witness stand? A. He is.

Q. And did you meet anybody else?

A. Mr. Sam Gailbreath was present.

Q. And did you have a conversation with these gentlemen? A. I did.

Q. And in the course of that conversation, did you take notes? A. I did.

Q. I show you Plaintiffs' Exhibit No. 4 for Identification. Were those your notes?

A. They are. [140]

Q. And at the conclusion of your conversation, did you read or show those notes to Mr. Gailbreath or Mr. Gregory?

A. I reread them to Mr. Harry Gregory and asked him for his signature.

Q. And was that in the presence of Mr. Gailbreath? A. It was.

Q. And is that signature—do those notes bear the signature of Harry Gregory? A. They do.

Q. Now, in that conversation, did you ask Harry Gregory or Sam Gailbreath who connected the stove involved? A. I did.

(Testimony of John L. O'Malley.)

Q. And what was the answer?

A. Harry Gregory stated he had connected the stove.

Q. And did he say whether anybody had attempted to connect it before he made the connection?

A. He said it had been partially installed.

Q. Did he indicate who—pardon me, can I get that answer?

The Court: It had been partially installed.

Q. (By Mr. Castro): And did he state who had done that partial installation? A. He did not.

Q. Did you ask him what part of the installation he did? A. I did.

Q. What did he state? [141]

A. He said, "I set it up and put the tubing from the tank to the stove, and the tubing was underneath the flooring."

Q. Now did he tell you about how long he was there doing this job?

A. Two and a half to three hours.

Q. And did he tell you who lighted to stove?

A. Harry Gregory said he had lighted the stove.

Q. Did he tell you that a Cerino Lemos had lighted the stove? A. He did not.

Q. Did he tell you that he used—did anything with the flashlight in the process of lighting that stove?

A. He did. He says that after he turned on the valve, he watched the flow of oil into the part of

(Testimony of John L. O'Malley.)

the stove and when he had left it on for a couple of seconds, when the oil was seen to flow with the flashlight, that he then threw in a lighted match.

Q. Did you ask him about the condition of the painting, whether he saw anybody painting in the office?

A. He said he did not see anybody painting.

Q. Did he state whether or not he smelled any fresh paint in the office?

A. I asked him and he said he did.

Q. Did he tell you whether there was any employee on the Gailbreath premises during that two and a half to three hours other than himself? [142]

A. I asked him and he said he was the only one.

Mr. Castro: You may cross-examine.

Cross-Examination

By Mr. Miller:

Q. Calling your attention to the two attached papers you have in your possession here, whose signature is that at the top (Spelling) H-a-r-r-y G-r-e-g-o-r-y? A. Yes, sir.

Q. You wrote that? A. Yes.

Q. All right. You don't pretend that that is the signature of Harry Gregory?

Mr. Castro: Neither do I.

Mr. Miller: Now, please, counsel.

Q. Now, let's go to the back of that. Do you know—— A. Yes, sir.

(Testimony of John L. O'Malley.)

Q. (Continuing): ——who wrote that?

A. I did.

Q. You wrote that, didn't you? A. I did.

Q. Let me ask you this: Is the name of Harry Gregory written in the handwriting of Harry Gregory apparent anywhere on that page?

A. No, sir.

Q. How long have you been in the business of going out and making investigations regarding insurance losses? [143]

A. Three and a half years.

Q. Three and a half years; and you were there for the purpose of having an interview with Mr. Gregory, to see what he knew about this fire; is that correct? A. Among other reasons.

Q. As a part of your regular employment, is that right? A. Yes, sir.

Q. And at that time, why, you were making that investigation with the expectation that any statements you received at that time might later be used in a trial of litigation, isn't that right?

A. Actually, I didn't want to record anything but the statement from him describing his actions on that day.

Q. Well, that isn't quite an answer, but maybe we can get at it this way, Mr. O'Malley: In your three and a half years, you have made for your employers many investigations, isn't that true—true of fire losses? A. Many—not many.

(Testimony of John L. O'Malley.)

Q. You have made several, haven't you?

A. Yes, sir.

Q. And why did you have him sign this second page here of this document?

A. I generally always do when I record the statement of a person, and ask them after I read it if he wants to sign it. [144]

Q. Yes. Why did you have him sign the second page? Will you give us the reason for it?

A. Because they were his words and I wanted to record them.

Q. They were his words? A. Yes, sir.

Q. And you wanted him, by signing it, to affirm those words and adopt them as his language; that is, your written words, is that right?

A. They happen to be—those written words are his language.

Q. All right. What I assume is this: That you had written down his language—— A. I did.

Q. (Continuing) ——on the sheet of paper; you had him sign; and then you wanted him to make that more formal by adopting it?

A. That is correct.

Q. All right; and did you do that on instruction from Swett & Crawford, your employers?

A. No, sir; on the instructions of the attorney presenting this case.

Q. Who was that?

A. An associate of Mr. Castro's.

(Testimony of John L. O'Malley.)

Q. He told you to go and get the statement, is that it? A. He did.

Q. All right; and he told you to have him sign it and adopt [145] it, is that it?

A. Well, it is usual. I don't know if he specifically asked me to secure the signature of any man on that statement. He did tell me to get a written statement from them if I could.

Q. All right. Now, why didn't you have him sign that first page?

A. So that it would be more authoritative.

Q. Why didn't you have him sign the first page?

A. To be truthful, the statement was taken on the outside of the house and the man was pressed because he had to hurry into the house for dinner, and that's why I didn't take a more formal statement on the typewriter in probably an office that I might have acquired in the town of Auburn. It was near the dinner hour and I purposely avoided having a more formal statement.

Q. By typing, is that what you mean?

A. That's right.

Q. Here is what I am getting at. You took the trip and the trouble to have him sign this one page; in fact, all the second page, or the first page of this document as you testified to, but why didn't you ask him to sign the other page?

A. I didn't think he would have any objection, so I didn't take the trouble to have him sign each page.

(Testimony of John L. O'Malley.)

Q. Yes. When did you put the name on there in pencil, [146] "Harry Gregory"?

A. Well, probably about two or three weeks later when I asked the stenographer in our office to transcribe those notes from handwriting to typewriting so that they might be more legible.

Q. At no time did you show this to Harry Gregory and ask him to try to read it, did you?

A. I believe I did, in this respect: that he actually witnessed my writing over my right shoulder and I copied down what he was telling me simultaneously so that he might have an opportunity to see what my writing was; although, granted, it is quite illegible.

Q. You grant that this writing is quite illegible, don't you? A. Yes.

Q. Now you didn't see Mr. Gregory here sit down and read this over and take a look and make any changes, did you?

A. No, as I said to you, I read it for him.

Q. You read it for him, is that right?

A. With him looking over my shoulder. I knew he knew the contents of it.

Mr. Castro: It hasn't been offered in evidence, your Honor. It was only used by this witness for the purpose of refreshing his own recollection.

The Court: Go ahead. [147]

Q. (By Mr. Miller): All right. Now, let's get the position. What were you writing on?

(Testimony of John L. O'Malley.)

A. I believe it was a carpentry table that was on the front lawn of his residence.

Q. A table on the front lawn of his residence; and you were standing up while you were writing, is that it?

A. It was an elevated table, and it seems to me I was standing up.

Q. You were standing up; is that it?

A. Yes, sir.

Q. And I assume you are right-handed? You write with your right arm? A. Yes, sir.

Q. And you were making these notes as he was talking, is that it? A. That's right.

Q. And you leaned over on this table which would be just like the one next to the court reporter, or just a little higher?

A. The structure right now is not clear to me, but it appeared to me a carpentry table a little more elevated than that one, and one commonly used in the construction of buildings.

Q. Well, it would be somewhat higher than this?

A. Elbow height, I think.

Q. How tall are you? [148]

A. Six, four.

Q. You are six, four; and this table would be about elbow height to you, wouldn't it, standing up?

A. Probably; yes, about that high; a little bit higher than the average table.

Q. And you were writing on that paper—these two papers, is that your contention?

(Testimony of John L. O'Malley.)

A. Yes, sir.

Q. Did you look around and see what Gregory was doing? Was he standing back of you?

A. He was right beside me looking over my right shoulder.

Q. He was looking right over your shoulder? You remember that vividly, is that it?

A. I will put it this way: He was periodically looking over my shoulder. He didn't continually remain at my shoulder.

Q. Was he walking around about the yard there as you were talking to him?

A. He may have in between. I discussed at length this fire and the cause, and he may have been walking around at different times during the course of this statement.

Q. Yes; he was walking around during this period?

A. Not during all of it.

Q. And you think that he may have had an opportunity to read some of your handwriting which you described as not very legible? [149]

A. If he didn't, I read it for him.

Q. Well, if he didn't see it, then you reread what you have written down here, is that it?

A. Actually, I have no way of knowing whether he read those notes, if that's your question; but he was peering over my shoulder in an endeavor to read them.

Q. Well, periodically as you described?

(Testimony of John L. O'Malley.)

A. Periodically, yes, sir.

Q. All right. Now after you wrote this—do we understand that you wrote this first page that is written on both sides here?

A. I wrote all that writing.

Q. Well the first page, what is that written? First the one that is written on both sides? Or the page that is just written on one side?

A. I don't know. I will have to look at it.

Q. All right.

A. I first asked him to describe the stove. So undoubtedly this is the first page where he describes the stove.

Q. You what ?

A. First asked him to describe the stove; so this would be the first page.

Q. All right. Then the first page was the page that was written on both sides, is that correct?

A. That's right. [150]

Q. And after you finished that page, then you went to the second page, didn't you?

A. Presumably.

Q. Now "Presumably"—is that correct, you did, didn't you, Mr. O'Malley? You wrote the double-sided page first then you went on to the second page?

A. It appears now as if I did, but, as a matter of fact, I don't know.

Q. You don't recall then, do you——

A. No, I don't.

(Testimony of John L. O'Malley.)

Q. (Continuing): ——whether you wrote the page with the writing on one side first, or the page with the writing on both sides, first?

A. No, I don't know. It seems to me I finished one side and then withdrew the second piece of paper and completed the statement.

Q. All right. Now, while you were writing one of these sheets, the second, you didn't turn around and hand the first one to Mr. Gregory and say "Look it over" did you? A. No, sir.

Q. Did you write down all the conversation and all the facts that were given about this fire?

A. All that were pertinent.

Q. Yes; and by the way, you want to tell his Honor at this time that you wrote down all the pertinent facts? [151]

A. Yes, sir.

Q. (Continuing): ——that were given to you by Gregory, is that right? A. Yes, sir.

Q. Did Mr. Galbreath join in any of this conversation between you and Mr. Gregory?

A. Yes, sir.

Q. Once in a while, he injected himself into the conversation, didn't he? A. Yes, sir.

Q. Did you write down anything Galbreath said?

A. No, I don't think I did at that time.

Q. All right. Now here, do you wish to tell his Honor, or tell me that at that time, the name of Mr. Lemos, this young fellow who testified he was an employee working there at that time and was at the

(Testimony of John L. O'Malley.)

lumber company on that day, was not mentioned by Mr. Gregory?

A. I certainly want to tell you that.

Q. At no time was he mentioned as an employee or as having anything to do with that stove or the delivery? A. Absolutely.

Mr. Castro: We will stipulate he had no knowledge concerning his identity until today, counsel.

Mr. Miller: Mr. Little, your witness, testified he was there. [152]

Mr. Castro: He didn't know who he was.

Q. (By Mr. Miller): By the way, you are naturally interested on behalf of Messrs. Swett and Crawford, your employers, in the outcome of the case here, aren't you?

A. Not particularly.

Q. Well, you would like to see the plaintiff here with this case, wouldn't you? A. No, sir.

Mr. Miller: That is all.

Redirect Examination

By Mr. Castro:

Q. You are paid regardless of the outcome of this case, aren't you? A. That's right.

Q. You are on a monthly salary with Swett and Crawford? A. Yes, sir.

Mr. Castro: No further questions. Oh, yes, I have one further question:

Q. Did you have any conversation with him concerning the size of that storage tank outside of the building? A. Yes, I did.

(Testimony of John L. O'Malley.)

Q. And what was the conversation?

A. It seems to me I was told that it was a 100-gallon tank.

Q. And did you have any statement as to how much oil had come out of the tank at the time it caught on fire? A. No, I didn't. [153]

Mr. Castro: No further questions.

Would you take the stand, Mr. Charley Little?

The Clerk: Charley Little will be recalled. Just take the stand, sir.

CHARLES W. LITTLE

recalled by the Plaintiffs on Rebuttal, previously sworn.

Direct Examination

By Mr. Castro:

Q. How many employees did you have at the Herold Lumber Company on the day of the fire?

A. Four.

Q. And who were they?

A. Roy Albers, James France I believe his name is, and Glen Carns and myself.

Q. Now Glen Carns is now dead?

A. That's right.

Q. What was his work there?

A. Sales end, helping the bookkeeper with the pricing.

Q. Did he at any time help to install that stove?

A. No, sir.

Q. Other than move the stove from Galbreath's

(Testimony of Charles W. Little.)

to your place of business and uncrate the top of it, did Roy Albers do anything in the installation of that stove?

A. I have no knowledge of that.

Q. Did you see him do anything toward the installation? A. No, I have no knowledge.

Q. Did you see Jim France do anything in the installation of [154] the stove? A. No.

Q. Now, did you furnish any chimney pipe or stovepipe for the connection between the stove and the flue? A. No.

Mr. Castro: You may cross-examine.

Cross-Examination

By Mr. Desmond:

Q. You testified this morning, Mr. Little, that you didn't know who installed the stove?

A. That is correct.

Mr. Desmond: That is all.

Redirect Examination

Q. Did you instruct any of your men to install it? A. Absolutely not.

Q. Was the man who came to your place of business, with the tubing and the other fittings, Mr. Lemos who is sitting back here?

A. Well, it appears to be the man, but that I couldn't identify this morning. I described him to you once as dark, and a new man to me that I didn't know.

Q. Did you give him any instructions to take

(Testimony of Charles W. Little.)

any of your men over and help him install that stove?

Mr. Miller: Just a moment, I object to that as being improper questioning, assuming something not in evidence. [155] He said "to install the stove."

The Court: Overruled.

Q. (By Mr. Castro): What was your answer?

A. No, sir.

Q. Were you present when Harry Gregory came to your plant?

A. I was. He might have been present, but I didn't see him.

Q. Do you have any definite recollection about when Gregory arrived? A. No, sir.

Q. Did he come up and discuss the stove with you? A. No, sir.

Q. Or ask you any instructions concerning the installation? A. No.

Mr. Castro: You may cross-examine.

Recross-Examination

By Mr. Desmond:

Q. You testified this morning, Mr. Little, didn't you? You testified on the stand here this morning?

A. I did.

Q. Do you remember giving testimony that you don't know who installed that stove?

A. That is correct.

Q. You also gave testimony that you don't know

(Testimony of Charles W. Little.)

who put up the stovepipe leading from the stove to the flue? [156] A. Correct.

Q. And you also testified that you didn't remember whether there was any stovepipe came with the stove because you had some in the plant?

A. My recollection is that we had no stovepipe in the plant. My recollection is that all the fittings necessary to install the stove would be brought over from Mr. Galbreath's.

Q. And were you charged with any of the stovepipe?

A. We were not charged with any stovepipe.

Q. Didn't you testify this morning that you thought you had some at the plant?

A. No, I didn't testify to that. I thought I said if there was any, it might have been used; but I can say that there wasn't any because we had nothing of the kind out there. It was an entirely new outfit. There had been no stove anywhere around there and no reason to have any pipe there.

Q. The testimony this morning was——

Mr. Castro: Let's have the testimony read back there counsel. I prefer it to counsel's notes.

The Court: Oh, I don't want to delay it. Proceed. You might ask him if he didn't testify so and so.

Q. (By Mr. Desmond): Didn't you testify this morning that you didn't remember whether there was pipe at your plant or whether you bought the pipe from Mr. Galbreath?

(Testimony of Charles W. Little.)

Mr. Castro: It has been asked and answered.

The Court: Overruled.

The Witness: As far as the purchasing of any stovepipe, there was no stovepipe purchased anywhere in our records; unless it came from Galbreath's, I don't know where it came from.

Q. (By Mr. Desmond): Oh——

A. It may have been an oversight on their part of charging it.

The Court: Anything further?

Mr. Desmond: Are you through, counsel?

Mr. Castro: Have you completed your cross-examination?

Mr. Desmond: I am through, yes.

Mr. Castro: That is all with this witness.

The Court: All right. Any further rebuttal?

Mr. Castro: The only other rebuttal witness I have would be a man, expert, with Sherwin-Williams, as to the question of inflammability of the Standard Floor Hardener, and that's the last evidence I have. If the Court feels it can make its decision without that evidence, I have no reason to proceed.

The Court: I don't care to commit myself one way or the other. You have got all your evidence in, and it is time to ask the commitments.

Mr. Castro: We will submit the matter on the record. [158]

Mr. Desmond: I would like to call Mr. Galbreath once more, your Honor.

SAM GALBREATH

recalled by the defendants on Surrebuttal. Previously sworn.

Direct Examination

By Mr. Desmond:

Q. Were you present, Mr. Galbreath, when Mr. O'Malley and Harry Gregory had this conversation at which Mr. O'Malley took notes?

A. Yes, I took him there.

Q. You took Mr. O'Malley to Gregory's residence? A. Uh-huh.

Q. Did Mr. O'Malley read the contents of those papers to Mr. Gregory? A. No.

Q. Did you have any discussion concerning it?

A. Well, we had a conversation as to the questions he was asking him, but he didn't read that paper back to him.

Mr. Desmond: That is all.

Q. (By The Court): Did you see him sign it?

A. Yes, the man signed it, just the one sheet.

Q. Just signed the one sheet, is that right?

A. I can't answer on that, but that's all I saw.

Mr. Desmond: That is all.

Cross-Examination

By Mr. Castro:

Q. Do you have any recollection as to what [159] was stated at that time and place by Mr. Gregory?

A. No, I can't recall the conversation.

Mr. Castro: No further questions.

The Court: That is all.

(Witness excused.)

The Court: Anything further?

Mr. Desmond: I have nothing further, Judge.

The Court: Well, gentlemen, I haven't any time to give you for argument in this matter. Why can't both of you write me a letter setting forth your views on it?

Mr. Castro: Either that, or else submit it on the record as it stands, your Honor.

The Court: Whatever you want.

Mr. Castro: Whatever your Honor wants to do. I will write the letter if that is what you wish, or what counsel wishes to do.

The Court: Oh, you write a letter within the next three or four days; and within the same length of time, the respondent will.

Mr. Desmond: That's right, your Honor, the plaintiff will write the letter and——

The Court: Yes, and after that, you have five days in which to reply.

Mr. Desmond: All right.

The Court: We will now adjourn. [160]

(The court was then adjourned.)

Certificate of Reporter

I, C. E. Moneyhun, Official Reporter Pro Tem, certify that the foregoing 160 pages are a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ C. E. MONEYHUN.

[Endorsed]: Filed Jan. 11, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the defendant.

Complaint.

Answer to complaint.

Amendment to complaint.

Findings of fact & conclusions of law.

Judgment.

Notice of appeal.

Designation of portions of record, proceedings

and evidence to be contained in the record on appeal, together with statement of points on appeal.

Order extending time to prepare record on appeal.

Reporters Transcript.

In Witness Whereof, I have hereunto set my hand and the Seal of said Court this 12th day of January, 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ C. C. EVENSON,
Deputy Clerk.

[Endorsed]: No. 12452. United States Court of Appeals for the Ninth Circuit. Sam Gailbreath, Appellant, vs. The Homestead Fire Insurance Company and Sun Insurance Office, Limited, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

To Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit:

You will please take notice that Appellant Sam Galbreath does file the hereinafter statement of points on appeal:

1. Insufficiency of the evidence to justify the decision and verdict of the District Court of the United States, for the Northern District of California, Northern Division.

2. That the decision and verdict of the District Court of the United States is against the law.

3. A stove is not an inherently dangerous article and the "Res Ipsa Loquitur" doctrine is not applicable.

4. The court committed error in finding that the fire was proximately caused by the stove.

5. The instrumentality complained of (the stove and its accessories) were not under the exclusive control of the defendants.

6. As a general rule, the destruction of property by fire does not raise the presumption of negligence.

Statement and Designation of Record Material to the Appeal

1. A transcription of all of the testimony reported at the trial in the District Court of the United States.

2. The Complaint, Amended Complaint, Answer, Findings of Fact and Conclusions of Law, Notice of Motion for New Trial, Decision, Judgment and Opinion of the District Court of the United States.

Respectfully submitted,

EARL D. DESMOND,

E. VAYNE MILLER,

K. D. ROBINSON,

Attorneys for Defendant and Appellant Sam Galbreath.

[Endorsed]: Filed March 6, 1950.

No. 12,452

IN THE

United States Court of Appeals

For the Ninth Circuit

SAM GALBREATH,

Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Appellees.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,452

IN THE

United States Court of Appeals

For the Ninth Circuit

SAM GALBREATH,

Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

This was an action brought to recover money paid by plaintiff insurance companies to the Herold Lumber Company (hereinafter referred to as the insured) under fire insurance policies issued by plaintiffs, based upon the alleged negligence of defendant's employees in the partial installation, controlling and testing of an oil burning stove.

JURISDICTION.

The jurisdiction of the District Court is based upon diversity of citizenship, as provided for in U.S. C.A., Title 28, Sec. 1332, the complaint alleging that the two plaintiff corporations were respectively citizens of Maryland and of England (Tr. pp. 2, 5) and that the defendant is a citizen of California (Tr. p. 3); it was further alleged, bringing this action within the section of the statute last referred to, that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. (Tr. pp. 3, 5.) In accordance with the provisions of U.S.C.A., Title 28, section 1393, the action was brought in the division of the District Court wherein the defendant Galbreath resides.

Appellate jurisdiction herein is founded upon U.S.C.A., Title 28, secs. 1291 and 1294.

SPECIFICATION OF ERRORS.

1. Insufficiency of the evidence to justify the decision and verdict of the District Court of the United States, for the Northern District of California, Northern Division.

2. That the decision and verdict of the District Court of the United States is against the law.

3. That the Court erred in finding that the fire was proximately caused by the stove.

4. Plaintiffs did not establish that the instrumentality complained of, the stove and its accessories, were under the exclusive control of the defendants.

5. As a general rule, the destruction of property by fire does not raise the presumption of negligence.

6. A stove is not an inherently dangerous article and the *"res ipsa loquitur"* doctrine is not applicable.

STATEMENT OF THE FACTS.

The testimony of plaintiffs' witnesses at the trial showed that one Roy Albers, an employee of the insured, picked up the stove in question at the defendant's place of business on October 31, 1946, and delivered it, still crated, to the office of the insured, there placing it behind a counter. (Tr. pp. 27-28.) He had no conversation with defendant or his agents as to how to install the stove, nor did he take delivery of any stovepipe or fittings or connections therefor. (Tr. pp. 31-32.) Charles Little testified that about a week prior to October 31st, acting as agent for the insured, he purchased from the defendant a "Custom Aire" stove, which was paid for by the purchaser. (Tr. pp. 38-39.) After delivery of the stove to Albers, it remained out of the possession of the defendant, and in possession of the insured.

Plaintiffs' exhibits (1) and (3) show a sale from the defendant to the insured of a "Custom Aire" stove for the price of $56.88, and of an oil drum, stove oil, bushings, valve, fittings and copper tubing,

for a sales price of $14.20; but nowhere is there shown a sale of any stovepipe nor of a flue for a damper for the stove.

Plaintiffs' witness Charles Little also testified (Tr. p. 61) that one of the employees of Lars Wold, a contractor employed by the insured, built the platform on which the oil drum was placed; and this same witness himself directed the defendant's employee (later shown to be Cerino Lemos) where to place the barrel of oil and to run the connecting tubing under the foundation of the building. Little also testified that the office wherein Albers placed the stove had been painted the day previously with Standard Oil floor hardener, an inflammable material. (Tr. pp. 56, 63); and he further showed that the defendant Galbreath had nothing to do with the installation of the chimney to which the stove was connected (Tr. p. 61), and that defendant made no charge for the installation of the stove itself (Tr. p. 55), although the insured was billed for the materials, excepting for the stovepipe, damper and flue, used in connection therewith. (Tr. p. 47.) By the witness, Jack Little, also employed by the insured and who was in the office at the time the fire started, plaintiffs adduced evidence that Harry Gregory, an employee of the defendant, threw a match into the stove, that there was a sort of a puff, and then a square of fire under the stove. (Tr. pp. 66, 67.) This witness also stated that the stove had been going before that time, basing his statement on the fact that it was warm in the office. (Tr. p. 69.) Plaintiffs then called

the defendant under Rule 46-A of the Civil Procedure Act, and proved by him that said defendant's agent Lemos had been directed to deliver fittings for the stove to the insured (Tr. p. 81), but that he had not been directed by defendant Galbreath to install it and that his acts were those of a volunteer. (Tr. p. 85.) This was virtually the sum and substance of plaintiff's case.

The defendant, testifying in his own behalf, stated that when purchasing the stove for the insured, Charles Little did not ask that it be installed (Tr. p. 92), and that Lemos was directed merely to deliver the oil container, place it upon the stand and fill it (Tr. p. 94); he was not to install the stove nor the chimney. (Tr. p. 99.) In this, he was corroborated by Cerino Lemos (Tr. p. 104), and such testimony stands uncontradicted in the record. Lemos further testified that some carpenters were building the frame for the oil drum when he arrived at the insured's premises and that while he was waiting for them to complete this work he crawled under the building and laid out some copper tubing. (Tr. p. 105.) This he ran to a hole in the floor drilled by one of insured's employees; and someone, assumed by witness to be one of the carpenters, but not shown to have been even remotely connected with the defendant, pulled the tubing up through the hole in the floor. (Tr. p. 106.) During this time Lemos also observed that there were men in the office, painting the walls (Tr. p. 107); and it was shown by the testimony of the contractor, Lars Wold, a disinterested

witness, that these painters were employed by Little, as agent of the insured. (Tr. p. 120.) Lemos also testified that some workmen were erecting the chimney (Tr. p. 109), and, again, he was corroborated by Wold (Tr. p. 122), who stated also that he (Wold) installed the flue. Returning to the activities of Lemos, it was shown that he hooked up the copper tubing to the oil drum and filled it (Tr. p. 107); he noticed in the office that the stove was apparently installed, the stovepipe in place and the copper fuel line connected to the carburetor of the stove. But Lemos did none of this work. (Tr. p. 111.) Lemos stated that he then lit a match, started the stove, and for some five or ten minutes observed that it was burning properly. (Tr. pp. 111, 112.) Defendant's witness Harry Gregory denied (Tr. p. 139) that he had thrown a match into the stove.

After hearing all of the evidence, the Court below made findings of fact in favor of the plaintiffs and entered judgment thereon, from which this appeal is taken.

THE COURT ERRED IN FINDING THAT THE FIRE WAS PROXIMATELY CAUSED BY THE STOVE.

As was concisely stated by the Nebraska Court in *Watenpaugh v. L. L. Coryell & Son,* 283 N.W. 204:

> "* * * It is not enough merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff must go further and show that the proximate cause of the happening of the fire and the con-

sequent damages to plaintiff's property was the negligence of the defendant in one or more of the particulars claimed."

Now, in this case, the only testimony on the subject is that a fire was ignited in the stove and was burning properly when suddenly a fire appeared on the wall or floor in the vicinity of the stove. There is a dearth of testimony of any kind to show how the fire was or could have been communicated from the inside of a steel encased stove to the wall or floor, except solely by surmise or conjecture. It is as reasonable, for all that appears in the record, that the fire was caused by a defective flue, a burning cigarette, a carelessly thrown match, spontaneous combustion of a painter's rag, or ignition of the Standard Oil floor hardener then being applied which was known to be highly inflammable when exposed to normal heat, or by the either voluntary or careless act of a third person. There is here a clear analogy to the situation before the California Court in *White v. Spreckels,* 10 Cal. App. 288, where it was said:

> "There is nothing to show that the explosion was caused solely by too great a pressure of steam in the radiator. In fact there was no such allegation in the complaint. The thing which injured the plaintiff was the escaping steam. It escaped for the reason that the radiator exploded. The cause of the explosion is a matter of conjecture from the evidence in the record."
>
> "If we rely on the doctrine of probabilities we might as reasonably infer that the explosion

> was caused by the use of wet towels upon the radiator (that were placed there to dry), or by reason of the radiator having been changed or weakened by its use by the lessee, or that it was caused by an excessive pressure of steam."

So, here, leaving for the moment the applicability of the doctrine of *res ipsa loquitur* which will be later discussed, there is nothing to show that any negligence on the part of defendant was the cause of the fire, and

> "* * * The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant."
>
> *Hubbert v. Aztec Brewing Co.,* 26 Cal. App. (2d) 664, 687.

THE DOCTRINE OF RES IPSA LOQUITUR CANNOT BE APPLIED TO THE INSTANT CASE.

As already noted, plaintiffs have failed to show the cause of the fire; and the rule is well established in California, as shown by the case of *Gerhart v. Southern Cal. Gas Co.,* 56 Cal. App. (2d) 425, 431:

> "* * * when it appears that the injury was caused by one of two causes for one of which the defendant is responsible, but not for the other, plaintiff must fail, if the evidence does not show that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other. (Citing cases.)"

And, as stated in *Biddlecomb v. Haydon,* 4 Cal. App. (2d) 361, 364:

"* * * neither does it (the *res ipsa loquitur* doctrine) apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible."

Applying these rules to the instant case we find (taking plaintiff's evidence) that the only testimony relative to the cause of the fire was that Gregory mopped up the floor under the stove (for a purpose not shown), threw a match into the stove; a short interval of time elapsed and there was a sort of a puff, a square of fire appeared under the stove, and the fire then spread to the walls. It is important to note that the defendant Galbreath testified, and in this he was not contradicted by any witness, that the oil drum did not burn or explode. (Tr. p. 98.) From this, it seems a reasonable and inescapable inference that the cause of the fire was not the oil drum. But plaintiffs still have not shown any facts sufficient to serve as a basis for an inference of negligence on the part of defendant; at best, they have left the cause of the fire a matter merely of guess, surmise and conjecture. It is equally likely that the fire was started by a cause other than the stove; for instance, as previously briefly noted, a common cause of fires is a defective chimney or flue. Such may well have been the case here. Also, it is a matter of common knowledge that paint saturated rags are ordinarily used by painters, and that such rags are subject to spontaneous combustion. Most significant, too, is the testimony that the office had been painted the day

before and even on the day of the fire, with a highly inflammable substance; it must be borne in mind that the defendant was in no way connected with these painting operations or the installation of the chimney or flue. It is at least equally to be inferred that the careless act of one of the many workmen shown to have been in and about the premises in close proximity to this inflammable matter caused the fire, as to be inferred that it was in some manner—unexplained by any of the evidence—caused by the stove.

PLAINTIFFS DID NOT ESTABLISH THAT THE INSTRUMENTALITY COMPLAINED OF, THE STOVE AND ITS ACCESSORIES, WERE UNDER THE EXCLUSIVE CONTROL OF THE DEFENDANTS.

It is elemental that

> "* * * the rule (of *res ipsa loquitur*) applies only where the instrumentality at the time of the accident was under the *exclusive control* of the defendant, and that is the interpretation which has been applied by our courts without exception. Where there is a division of responsibility in the use or management of the instrument which causes the injury, and such injury might in equal likelihood have resulted from the separate act or acts of either one of two or more persons, the *res ipsa loquitur* doctrine cannot be invoked against any one of them. (Citing cases.)"

Gerber v. Faber, 54 Cal. App. (2d) 674, 685.

This same rule has been applied by the California Courts to cases involving an explosion.

Biddlecomb v. Haydon, supra;
Hubbert v. Aztec Brewing Co., supra;
Weaver v. Shell Oil, 13 Cal. App. (2d) 643, 645-647;
Gerhart v. Southern Cal. Gas Co., supra.

Here, the evidence conclusively establishes that title and possession of the stove was transferred from the defendant to the insured, who hauled the stove from defendant's premises and the insured installed it in the office of the insured's lumber yard; that not one joint of stovepipe was sold or installed by the defendant; that the stove was set up and pipe installed by men in the lumber yard who were not agents or employees of the defendant; that the flue was not installed by Galbreath or his agents, but rather by an independent contractor employed by the insured; that the defendant gave no instructions to his agents to install the stove; that the fuel line was not connected to the stove by Galbreath or any person under his direction; that the frame for the oil drum was not built by Galbreath; that the inflammable paint was not furnished or applied by Galbreath; that the carburetor on the stove was not adjusted by him or his agent; that the origin and installation of the damper is not established by the evidence; that at least five other persons, or groups of persons, are thus shown to have had some degree of control and management—Wold, the contractor, who built the platform for the oil drum and installed the

flue, the painters (employed by the insured), who were working about the office, the workmen who connected up the copper tubing to the stove, those who installed the chimney, and, finally, the insured who, by virtue of its ownership, had the right of control over the stove. In this regard, the following language, quoted from *Gerhart v. Southern Cal. Gas Co., supra,* is pertinent.

> "* * * It is contended * * * that regardless of the control of the other instrumentalities, such as the pipes, fittings, vault, meter and valves, the 'thing' or instrumentality causing the explosion was the gas itself; * * * We are unable to adopt the narrow interpretation placed upon this rule by respondent under the facts here disclosed. A defective or leaking pipe or connection from which the gas must of necessity have escaped in the pit or vault should be considered to be at least one of the 'instrumentalities' or 'things' referred to in the rule * * *. It has often been held that where all of the instrumentalities which might have caused an accident were not under the control of the defendant, the doctrine cannot apply * * *."

To the same effect, with regard to two or more instrumentalities, not all of which are under the control of a defendant, see *Godfrey v. Brown,* 220 Cal. 57. Having failed to show that the defendant was in exclusive control and management of the instrumentality which caused the injury, the plaintiff cannot here rely upon the doctrine of *res ipsa loquitur*, and, there being neither pleading nor proof of any specific act of negligence, the plaintiff cannot

recover, once the inference raised by the doctrine is out of the case.

AS A GENERAL RULE, THE DESTRUCTION OF PROPERTY BY FIRE DOES NOT RAISE THE PRESUMPTION OF NEGLIGENCE.

As a general rule, the destruction of property by fire, either upon the premises where it starts or is kindled or on the other property to which it is communicated, does not raise a presumption of negligence in either the kindling or management of the fire.

Keithley v. Hettinger, 157 N.W. 897 (Minn.);
Kapros v. Pierce Oil Co., 25 S.W. (2d) 777 (Mo.);
Blackburn v. Norris, 189 N.E. 262 (Ohio);
Kendall v. Fordham, 9 P. (2d) 183 (Utah);
Barrickman v. Marion Oil Co., 32 S.W. 327 (W. Va.).

"A fire will be presumed to have been accidental upon mere proof of the burning."

Bines v. State, 45 S.E. 376 (Ga.);
State v. Picnick, 90 P. 945 (Wash.).

In California, the legal concept of *res ipsa loquitur* has never been extended to common fires and the basic fundamental civil rules of burden of proof and preponderance of evidence prevail in this jurisdiction. In

Watenpaugh v. L. L. Coryell & Son, 283 N.W. 204 (Neb.),

it was held:

"The gist of this action is negligence. It is not enough merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff must go further and show that the proximate cause of the happening of the fire and the consequent damages to plaintiff's property was the negligence of the defendant in one or more of the particulars claimed.

"No presumption of negligence either in the kindling or management of the fire is raised by the destruction of property by it.

" 'In action for damage by fire, alleged to have spread from defective stove in adjoining building, judgment for plaintiff could not be sustained where there was no proof that defect in stove caused fire.' Lezotte v. Lindquist, 51 S.D. 97, 212 N.W. 503, 504 * * *

"By negligence is meant the doing of some act, under the circumstances surrounding the fire involved, which a man of ordinary prudence would not have done, or the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken.

"It is merely a convenient term under which to group a failure to conform to the standards of conduct insisted upon by society. We should consider whether probable harm to plaintiff's property could have been reasonably anticipated was within the range of defendant's conduct.

"The evidence of plaintiff fails to show the cause of the fire. There was no defect in the stove, stove pipe or chimney; there is no proof that any of the articles in the office room caused

the fire. When first discovered it was in the ceiling of the office and the roof above. The tin quart cans with screw tops on the floor, the unionalls hanging on the walls, the paper forms on the table and in the pigeon holes in the wall, the box on the floor * * * none of these are shown as connected with the fire or the cause of it.

"Assuming that the statements of defendant Hebel were competent, which we do not decide, they amount to admitting that he put some coal on the fire and went out for a cup of coffee; expressed an opinion the day after the fire to a question as to what the fire was attributed to, and that he had built a hot fire and went to the lunch room, and asked not to be quoted.

"On a cold night the ordinary use of a stove is to place coal in it and build a hot fire. There is nothing to show that the stove was overheated the night of the fire, nor that an overheated stove caused the fire. There could be many different causes for this fire. We cannot say it is unusual for Hebel to leave the office for a cup of coffee. The burden is on the plaintiff to prove that the negligence charged was the proximate cause of the damages, which this record shows was not sustained.

"The evidence introduced by plaintiff was insufficient to submit the case to the jury, and the separate motions * * * for a directed verdict * * * should have been sustained."

A STOVE IS NOT AN INHERENTLY DANGEROUS ARTICLE AND THE "RES IPSA LOQUITUR" DOCTRINE IS NOT APPLICABLE.

In the case of *McCabe v. Boston Consol. Gas Co.* (Mass.) 50 N.E. 640, it was held the doctrine of "*res ipsa loquitur*" did not apply. In that action plaintiff sought to recover for damages because of the explosion of a gas stove. Plaintiff bought the stove January 6, 1938, and on February 3, 1938, it exploded and damaged the property of plaintiff. Three weeks after the stove was installed plaintiff complained to defendants and they examined the stove but did not repair it. The plaintiff seeks to hold the defendants for negligence in *selling, installing* and *failing to repair the stove,* and the Court held,

> "There is *no evidence* that the *defendant* was the *manufacturer,* and apparently was not. The stove was not an inherently dangerous article and the defendant *is not liable for negligence unless* it knew or ought to have *known of its* defective nature. (Citations listed.) There was no evidence of leakage of gas before the explosion. In short, the cause of the explosion remains a mystery."
>
> "It is true that the plaintiff was not required to show the exact cause of the explosion * * * but the plaintiff had to show a greater probability that it *resulted from the defendants'* negligence than from a nonactionable cause. This in our opinion she failed to do."
>
> "In this case it cannot be said that *res ipsa loquitur* applies. The situation was not in the exclusive control of the defendant. *The charac-*

teristics of the stove were determined by its manufacturer and its operation was in control of plaintiff." (Italics ours.)

We should bear in mind that the stove in the instant case was not manufactured by Galbreath and that he is sued for negligence.

In the case of *Le Zotte v. Lindquist* (South Dakota), 212 N.W. 503, appellants' building caught fire and consumed respondent's building and respondent recovered a judgment, which the Supreme Court of South Dakota reversed upon appeal. The respondent claimed that the fire started on appellants' premises at 11 p.m. by reason of a crack or check in the fire pot of a stove in a (V) shape, large enough to see the fire through; *however, it was not charged that fire or coals dropped from the stove by reason of this defect,* and the court held,

"Negligence is not presumed from the mere fact of injury, when injury is as consistent with unavoidableness as with negligence or when cause of accident is doubtful or injury can as well be attributed to act of God or unknown cause as to negligence."

"No presumption of negligence, either in the kindling or management of fire is raised by the destruction of property by it."

"In an action for fire which spread from defendants' building, brought on the ground that it was negligently caused by defective stove, held: that *doctrine of res ipsa loquitur* did not apply."

In the action of *Highland Golf Club v. Sinclair Refining Co.* (Iowa) 59 Fed. Supp. 910, a verdict was directed for defendant. The plaintiff owned a clubhouse on a golf course and defendants delivered gasoline into a barrel in the basement of the clubhouse near the pilot light of a water heater. A fire occurred without an explosion and plaintiff stated manner in which fire started was unknown to it. The Court held:

> "Apart from the statute, liability for damage caused to others by fire is based on negligence and one seeking to recover such damages has the burden of proving the negligence of the party charged."

> "The general run of cases where *res ipsa loquitur* is relied on are cases where the defendant is the owner or operator in charge and control of a premises and is being urged by a plaintiff who was on the premises for proper reasons. In the instant case it is the other way around, the owner and operator of a premises is suing a party who (by its servant) came onto the premises."

> "It would seem clear that when an owner of a premises orders merchandise delivered to such premises, that such owner does not intend to confer or does confer upon the deliveryman control over such premises or any portion thereof * * * it might be noted that the deliveryman *is an invitee,* and further noted that the owner of the premises owed to invitees the duty of using ordinary care to keep such premises safe."

"There is another feature to be noted in the instant case. There is no evidence of an explosion, there was only evidence that a fire started. In situations having to do with substances like gasoline, the line between an explosion and a fire is not always distinct and they are sometimes closely connected with each other. Apart from statute, the courts have been very reluctant and sparing in drawing an inference of negligence from the starting of a fire." (Citing many cases.)

"The courts recognize that fires are frequent occurrences and in a great many cases without any negligence on the part of anyone. Because of this the doctrine of *res ipsa loquitur* is applied only in exceptional cases in the causes of fires. If the rule of *res ipsa loquitur* were to be applied generally to fires, it would be obvious that the owner or tenant in control of a building in which a fire started would in a great many cases be held to a calamitous liability for a non-negligent occurrence."

The supra case cites California authority.

In the action of *Hendricks v. Weaver* (Mo.) 183 S.W. (2d) 74, a tenant sued the landlord for damages caused by the explosion of a stove and subsequent fire. The Court refused to apply the *res ipsa loquitur* rule and held, assuming that the evidence is sufficient to show an explosion took place, there is no evidence from which an inference can be drawn that the fire started from the stove or from the oil.

CONCLUSION.

In conclusion it is submitted that the plaintiffs have failed to establish sufficient facts to enable them to rely upon the *res ipsa loquitur* doctrine. The evidence is lacking in the following particulars: there is no evidence to show that the fire was proximately caused by the stove; there is not a scintilla of evidence that the injury or fire was brought about by a cause for which defendant is responsible; and there is not an iota of evidence showing exclusive control in the defendant of the instrumentality causing the injury. It is, therefore, respectfully submitted that the findings of fact made by the lower Court are without evidentiary support and that the judgment herein should be reversed.

Dated, Sacramento, California,
May 12, 1950.

Respectfully submitted,
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Attorneys for Appellant.

No. 12,452

IN THE

United States Court of Appeals

For the Ninth Circuit

SAM GAILBREATH,
Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,
Appellees.

Appeal from the United States District Court, Northern District of California, Northern Division.
Honorable Dal M. Lemmon, Judge.

APPELLEES' REPLY BRIEF.

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APPELLEES' REPLY BRIEF.

STATEMENT OF PLEADINGS.

The complaint contains two causes of action. The first cause of action is on behalf of appellee The Homestead Fire Insurance Company, a corporation organized and existing under the laws of the State of Maryland and licensed to engage in the business of fire insurance in the State of California; the second cause of action is on behalf of appellee Sun Insurance Office, Limited, a corporation organized and ex-

isting under the laws of England and licensed to engage in the business of fire insurance in the State of California (Transcript* p. 5).

The gravamen of each cause of action is that each appellee issued a fire insurance policy to Herold Lumber Company (hereinafter called Herold), whereby each appellee insured Herold against loss and damage by fire to a certain building and personal property situate therein; that on the 31st day of October, 1946, appellant's employees, Cerino Lemos (hereinafter referred to as Lemos) and Harry Gregory (hereinafter referred to as Gregory), acting in the scope of their employment, carelessly and negligently installed, controlled and tested a certain oil burning stove in such building and did thereby cause a fire in such building, which destroyed the building and a portion of said personal property, and by reason of such destruction each appellee paid Herold a certain sum of money in excess of the sum of Three Thousand Dollars ($3,000.00) under its respective fire insurance policy, and by reason of such payments each appellee became subrogated to the rights of Herold against appellant, who negligently caused such fire (T. 3-7, inc.).

The answer of appellant denied each material allegation of the complaint. The answer did not raise any other defense.

At a pretrial conference, appellant admitted each allegation of the complaint, except the allegations of

*Hereinafter referred to as "T."

negligence and proximate cause (T. 51-52, 73) and the only issues before the trial court were negligence and proximate cause.

STATEMENT OF CASE.

There are certain basic facts shown by the evidence, which may be described as follows:

1. At all times appellant's business was the sale and installation of oil stoves. Gregory and Lemos were his employees. Prior to this fire, Gregory had worked for appellant for four to five years and Lemos had worked for appellant for two and one-half to three months. Their duties included the installation of stoves (T. 80, 103, 113, 136).

2. The building was a new frame lumber shed situated upon approximately two acres of ground at Auburn, California (T. 35), and was constructed by Lars Wold, a building contractor (T. 120). The building was approximately 32 feet wide and 64 feet long and was constructed of fir timber and siding. In the southwest corner of the building an office was constructed, approximately 16x16 feet. There were two windows each on the south and west sides of the office and it had two doors (T. 36).

In the office, there was a wooden counter set about three feet from the south wall. The counter was approximately 22 inches wide, 40 inches high and 13 feet in length. There were two wooden desks and a telephone (T. 37).

3. The fire occurred on October 31, 1946, shortly before 5:00 o'clock P.M. (T. 69).

4. Approximately one week prior to the fire, Charles W. Little (hereinafter referred to as Charles), yard manager for Herold, went to appellant's place of business to purchase a stove for the office. Appellant agreed to sell Herold such a stove, the necessary tubing, pipes and fittings and to install the same (T. 38-39).

5. The following events occurred on the day of the fire:

(a) In the morning, Charles sent one of Herold's employees, Roy Albers, to pick up the stove at appellant's (T. 43). Appellant delivered to Albers a Customaire Oil Stove with 35,000 b.t.u. capacity, which was in a crate (T. 27, 40, 82). Albers hauled the crated stove to the office, where he placed it behind the counter. Albers removed the top of the crate to look at the stove but did not remove the stove from its crate nor install the stove (T. 27, 28, 29).

(b) About midday, appellant instructed Lemos to take an oil drum, oil and some fittings to Herold's, which Lemos did in appellant's service pickup truck (T. 29, 104). Charles told Lemos where to place the oil drum and to run the copper tubing under the floor of the building (T. 58-59).

While the carpenters employed by Wold were completing the platform for the oil drum on the westerly side of the building, Lemos took the copper tubing, which was to carry the oil from the oil drum to the

stove, and laid it out under the building. Lemos requested one of the carpenters to locate the 2x4's under the floor, which an unidentified carpenter did, and drilled a hole for the tubing. Lemos then poked the tubing through the hole. Lemos filled the drum, put a valve on the copper tubing and connected it to the drum (T. 105-108). Lemos remained at Herold's until around 4:00 o'clock P.M. (T. 116).

(c) Around 2:00 or 3:00 o'clock P.M., appellant's other employee, Gregory, arrived at Herold's to install and test the stove. Gregory set the stove up and connected the tubing to the stove (T. 129, 150-151). The stove was 12 to 24 inches from the easterly wall of the office, which was the nearest wall to the stove (T. 66, 110, 124).

(d) Around 4:00 o'clock P.M., Charles' brother, Jack E. Little (hereinafter referred to as Jack). entered the office, where he saw Gregory and another man, whom he was unable to identify, working on the stove. At this time, Glenn Carns, a salesman for Herold, was also in the office and some carpenters were working on the counter (T. 64, 69). Jack remained in the office for a few minutes and then went into the lumber yard, but was in and out of the office several times until he reentered the office shortly before 5:00 o'clock P.M. to make some telephone calls (T. 65, 69).

(e) Shortly before 5:00 o'clock P.M., while talking on the telephone to his brother Charles, Jack was standing behind one of the desks and facing the stove. Jack saw Gregory take a rag and mop up the

floor under the stove. When he completed the wiping up, Gregory opened up the port of the stove and threw in a lighted match; then there was a "sort of puff" and a square of fire appeared under the stove in the area where Gregory had wiped up the floor. Gregory took his jacket and attempted to beat out the fire, but the fire spread and Gregory attempted to pick up the stove but dropped it on its side (T. 67).

(f) At the time of the fire, the only persons in the office were Jack, Gregory and the unidentified man who was working on the stove with Gregory when Jack had entered the office around 4:00 P.M. (T. 66). The pickup truck, which appellant's employees drove to Herold's, was still outside the office (T. 33).

6. The day before the fire, the office was painted by Herold's employees. On the day of the fire, these employees painted a portion of the floor behind a door and the front of the counter. Standard Oil floor hardener was used and takes approximately 24 hours to dry (T. 56-57, 63, 128). Such hardener has a flash point of 105 degrees Fahrenheit (T. 76).

Wooden boards were placed on the floor after it was painted to protect the floor from persons walking in and out of the office (T. 122, 127).

Appellant had full knowledge concerning all painting which was done on the day of the fire in the office. His employee Lemos saw such painting being done and his other employee, Gregory, knew it was freshly painted before he ignited the match and threw it into the port (T. 107, 138).

7. Building contractor Wold obtained a building permit to install a flue in the office. It was a patent flue with terracotta lining and aluminum casing. The top of the flue outlet was twelve inches from the ceiling and extended into the wall through a "T" and up through the roof of the building (T. 122-123). The flue was properly installed and passed by an inspector prior to the fire (T. 128).

8. Wold's employees did not have anything to do with the installation of the stove (T. 124). Herold's employees did not install the stove (T. 162, 163).

ARGUMENT.

The trial court found that the fire was proximately caused by appellant through the negligence of his employees in installing, controlling and testing such stove. Paragraph VI of the Findings of Fact reads as follows:

> "It is true that on October 31, 1946, said Cerino Lemos and Harry Gregory who were then acting in the course of their employment as the employees of said defendant Sam Galbreath, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in said building as to cause, and they did cause, a fire to start in said building which fire resulted in the destruction of said building and part of stock of lumber." (T. 17-18.)

It is settled law that on an appeal, even though there is a conflict in the evidence, this court will

assume as true the view of the evidence most favorable to appellee,

Wilmington Transp. Co. v. Standard Oil Co. (1931 C.C.A. 9th) 53 F. (2d) 787.

The evidence shows that appellant agreed to install this stove; that two of his employees, Gregory and Lemos, installed the stove and with full knowledge of the fresh paint his employee Gregory threw a lighted match into the port of the stove, which was immediately followed by a puff and a fire appeared on the floor directly below the stove in the area which Gregory had mopped up with a rag immediately before striking the match; that Gregory took a coat to beat out the fire but the beating caused the fire to spread to the east wall; that Gregory picked up the stove and dropped it on its side and the building was destroyed by fire.

It is appellees' position that the evidence shows negligence on the part of appellant and that, if it does not support a finding of negligence, the doctrine of *res ipsa loquitur* will apply and support such finding of negligence.

I.

THE DECISION OF THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE.

A. Appellant's business included the sale and installation of such stoves.

Appellant has admitted that his business included the delivery of fuel oil for and the sale and installation of such stoves and that Gregory was employed by him and as a part of his work installed such stoves (T. 80). Gregory testified that prior to this fire, Lemos also installed stoves for appellant (T. 136).

B. Appellant agreed to install stove.

About one week before the installation of the stove, appellant informed Charles, Herold's yard manager, that he would sell Herold the stove, furnish the necessary parts and install the same.

Under direct examination, Charles W. Little testified in part as follows:

"Q. Now, are you acquainted with Sam Galbreath?

A. Yes.

Q. How long have you known him?

A. About ten years.

Q. And during that time have you done any business with him?

A. Oil—stove—

Q. And during the month of October, 1946, did you have any conversation with him concerning a heating system or a heating unit for that office?

A. I did.

Q. Where did that conversation take place?

A. In his office.

Q. Who was present?

A. Well, I don't remember if there was anybody present; probably some one of his employees may have been in and out.

Q. Whom did you talk to at that time?

A. Sam.

Q. What was your discussion?

Mr. Desmond. Will you fix the date?

Q. (By Mr. Castro). Can you fix that date with relation to when you had a fire at the lumber company?

A. Previous.

Q. About how long previous?

A. It may have been a week.

Q. And what was that conversation?

A. To see whether or not he could furnish me a stove.

Q. And was he able to furnish a stove?

A. He said he could, yes.

Q. And, did he give you any description or name of the stove?

A. Well, no, any more than we discussed the size of the stove necessary to heat the area that was to be heated.

Q. And what size of stove was it to be?

A. That I can't tell.

Q. Now was there any discussion concerning the installation of the stove?

A. No more than he had the necessary tubing, pipe and fittings and would install it." (T. 38-39.)

C. Appellant's employees installed the stove.

Around midday, on the day of the fire, at appellant's instruction, Lemos drove appellant's service

pickup truck to Herold's with the necessary fittings for the installation of the oil drum and stove (T. 104). Lemos arrived at Herold's shortly after lunch (T. 116). Herold's yard manager, Charles, informed Lemos where the oil storage drum was to be placed and requested Lemos to run the tubing under the building (T. 44). Between 2:00 and 3:00 P.M., Gregory, appellant's other employee, who had installed stoves for several years for appellant, arrived at Herold's (T. 130). Later, Charles, who was working in the lumber yard, saw Lemos with Gregory and saw Gregory going in and out of the office (T. 45-46). Lemos admitted that before Gregory arrived, since Herold had bought the stove, he decided to give him service and hooked up the oil drum (tank) to the copper tubing (T. 108), ran the tubing from the drum under the building through a hole in the floor, drilled by a carpenter at his request (T. 105-106). After the tubing had been run through the floor, the building contractor, Wold, saw Lemos around the office (T. 125) and the only other persons Wold saw in the office were two painters, who were painting the counter (T. 121, 126-127).

At his home, Gregory admitted to John O'Malley, in the presence of appellant, that he worked on the stove for about two and one-half to three hours, connected the tubing from the tank to the stove, turned on the valve for the oil, watched the oil flow into the stove for a couple of seconds, than threw a lighted match into the stove and the fire immediately occurred. O'Malley made written notes of the con-

versation, which Gregory signed (T. 149-152). Under cross-examination, Gregory admitted he talked with O'Malley and placed his signature on the notes (T. 142) and Gregory did not deny that he made such statements (T. 140). Likewise, appellant, when called as a surrebuttal witness on his own behalf, admitted he took O'Malley to Gregory's residence, that O'Malley talked to Gregory and took notes of what was said, and Gregory signed the notes; and appellant did not deny that Gregory made such statements to O'Malley (T. 167).

When interrogated by the trial court, Gregory admitted that he went to Herold's "to take care of things in case there was anything ever would happen to it" (the stove), as follows:

> "Q. (By the court). What were you doing there that day at all?
>
> A. Well, we sold the stove to these people and naturally I was just trying to be—to stay there and take care of things in case there was anything ever would happen to it." (T. 137.)

> "Q. I can't understand why you would be there just to see if anything happened. Did you inspect to see if it was all right?
>
> A. I knew that Mr. Galbreath sold them the stove and I thought maybe I would just stay there until—and see if there was anything—if there was anything went wrong with the thing." (T. 138.)

D. Appellant's employees, Lemos and Gregory, had full knowledge that the office was freshly painted.

According to Lemos' testimony, Lemos saw two painters painting the walls (T. 107) and Gregory admitted he knew the office had been freshly painted (T. 138).

E. Appellant's employee Gregory ignited the fire.

Jack testified that shortly before 5:00 P.M. on the day of the fire, he entered the office to telephone. While telephoning, he was facing the stove and saw Gregory do these acts: Gregory took a rag, wiped up the floor under the heater and then opened the port of the stove and threw in a lighted match, which was immediately followed by a puff and a square of fire appeared under the stove in the same area that Gregory had just wiped up. Gregory took a jacket and attempted to beat out the fire. The fire spread and Gregory tried to pick up the stove but dropped it on its side. The fire started up the inside wall, across the ceiling and down the other side of the room (T. 66-68).

II.

DECISION OF THE TRIAL COURT IS NOT AGAINST THE LAW.

A. Negligence may be proved by circumstances.

While the burden of proof was upon appellees to prove negligence on the part of appellant as a proximate cause of this fire by a preponderance of

the evidence, such rule does not require demonstration or absolute certainty because such proof is rarely possible,

Kennedy v. Minarets & Western Ry. Co. (1928) 90 Cal. App. 563, 266 Pac. 353;

Hall v. San Joaquin L. & P. Corp. (1935) 5 C.A. (2d) 755, 43 P. (2d) 856—fire due to defective wire;

Hilson v. Pacific Gas & Electric Co. (1933) 131 Cal. App. 427, 21 P. (2d) 662—insufficient gas pressure or faulty adjustment of burners;

Phillips v. Southern California E. Co. (1937) 23 C.A. (2d) 222, 72 P. (2d) 769—circumstantial evidence that fire started by arc from defendant's transmission line;

37 *Cal. L. Rev.* 189, n. 35, et seq.

The evidence shows that the fire was caused by appellant's employee Gregory, when, with full knowledge that the office had been freshly painted, Gregory, without considering whether such paint created a fire hazard, ignited a match and threw it into the stove, which act was immediately followed by a puff from the stove and flames appeared on the floor under the stove in the area Gregory had just wiped up with a rag, and Gregory attempted to beat out the flames but they spread and Gregory then attempted to pick up the stove, which fell on its side (T. 66-67).

Appellant has not offered any evidence to show that any other act occurred between the wiping up of the floor and the fire.

If the paint created a fire hazard, as contended by appellant at pages 7, 9 and 10 of his opening brief, and the rapidity with which the fire spread is evidence of the hazard created by the painting, then it was the duty of appellant's employees, who had knowledge of such paint, in the exercise of ordinary care, to take some precautions against such fire hazard before Gregory attempted to ignite the stove.

It is an elementary rule of law that the amount of caution required by the law increases as does the danger that reasonably should be apprehended,

Roselip v. Raisch (1946) 73 C.A. (2d) 125, 166 P. (2d) 340;

McVay v. Central California Inv. Co. (1907) 6 Cal. App. 184, at 187, 91 Pac. 745.

The evidence does not disclose that any precautions were taken by appellant's employees. Whether, under the circumstances, any precautions should have been taken or whether the attempt to ignite the stove should have been made was a question of fact for the trial court to determine and the trial court has decided that appellant was negligent in attempting to ignite the stove.

Further, immediately before the fire appellant wiped something from the floor under the stove. Why this was necessary, the nature of the material wiped up, where it came from or whether it was inflammable was not shown by the evidence, but the evidence showed this area was the first place the fire developed after the "puff".

As stated in

Hilson v. Pacific Gas & Electric Co. (1933) 131 Cal. App. 427, 21 P. (2d) 662, at 664:

"More than one man has gone to the gallows upon circumstantial evidence not so strong."

In appellant's opening brief, at page 7 thereof, six causes of the fire are suggested by appellant, as follows:

That the fire was caused by:

"1. A defective flue;

2. A burning cigaret;

3. A carelessly thrown match;

4. Spontaneous combustion of a painter's rag;

5. Ignition of the Standard Oil floor hardener then being applied, which was known to be highly inflammable when exposed to normal heat; and

6. By the either careless or voluntary act of a third person." (Numbers inserted by us for reference clarity.)

As to the enumerated causes 1, 2 and 6, the evidence shows that as to "cause 1" the flue was a patent flue and a permit had been obtained by the contractor, Wold, for its installation; that it was properly installed and passed by an inspector as properly installed before the fire; further, there is no evidence that such flue contributed to the cause of the fire. If it did contribute to the fire, it was not a defense to appellant for, as stated in *Hilson v. Pacific Gas*

& Electric Co. (1933) 131 Cal. App. 427, 432, 21 P. (2d) 662, Wold's negligence, if any, would be concurrent with that of appellant, and either or both would be liable at the appellees' election (T. 128). As to "causes 2 and 6," the record does not show that any cigaret was burning or that any third person, other than appellant's employees, did any voluntary or careless act to cause the fire. On the other hand, as to enumerated "causes 3, 4 and 5," the evidence shows that the match was thrown by appellant's employee Gregory; that the only rag which was used was the rag which Gregory used to mop up the floor under the stove (T. 66-67) and that the painting of the floor and walls was known to both employees of appellant, Lemos and Gregory, (T. 113, 118, 140) and the record is silent as to any precautions taken by Gregory against such a fire hazard. Therefore, even though appellant did not intend to make such an admission of negligence, the evidence concerning enumerated causes 3, 4 and 5 demonstrates appellant's negligence and sustains the findings of the trial court that appellant was negligent in installing, controlling and testing the stove.

It is clear that a defendant cannot prevail as a matter of law upon a mere showing of circumstantial evidence which suggests another possible cause e.g., as in a case where a break in a power line might have been due to a rifle bullet. See, *Manuel v. Pacific Gas & Electric Co.* (1933) 134 Cal. App. 512 (25 P. (2d) 509), where the court said:

> "* * * as to the facts the jury were apparently not convinced by the theory of the break of ap-

pellant, and whether the break was due to the impact of the rifle bullet or to kinks in the line put in when the cable was strung or to a blow from an unknown tool, or to some other unexplained cause, was for them to determine."

Likewise, in this case it was for the trial court to determine what caused the fire.

B. Res ipsa loquitur applicable.

It is stated that the doctrine of res ipsa loquitur applies, "When a thing which causes an injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care."

Wright v. Southern Counties Gas Co. (1929) 102 Cal. App. 656, at 664, 283 Pac. 823;

Judson v. Giant Powder Co. (1895) 107 Cal. 549, 40 Pac. 1020;

Ireland v. Marsden (1930) 108 Cal. App. 632, 291 Pac. 912.

The doctrine has been applied to fire cases,

Rosclip v. Raisch (1946) 73 C.A. (2d) 125, at 134, 166 P. (2d) 340;

Davidson v. American Liquid Gas Corp. (1939) 32 C.A. (2d) 382, 89 P. (2d) 1103.

Also see:

Brown v. Standard Oil Co. (1917) 247 Fed. 303;

Hawes v. Warren (1902) 119 Fed. 978.

1. Right of control and management was in appellant.

The California courts have said that exclusive control is not limited to the actual physical control (which appellees contend appellant had), but applies to the right of control of the instrumentality which causes the injury,

Union Oil Co. v. Rideout (1918) 38 Cal. App. 629, 177 Pac. 196;

Metz v. Southern Pacific Co. (1942) 51 C.A. (2d) 260, 124 P. (2d) 670;

Hackley v. Southern Pacific Co. (1935) 6 C.A. (2d) 611, 45 P. (2d) 447;

Van Horn v. Pacific Refining & Etc. Co. (1915) 27 Cal. App. 105, 148 Pac. 951.

It is sufficient if appellant was in exclusive control at the time of the probable negligence,

Escola v. Coca Cola Bottling Co. (1944) 24 C. (2d) 453, 150 P. (2d) 436;

37 Cal. L. Rev. 199.

Even though title to the stove had passed to appellees, the doctrine of *res ipsa loquitur* still applied because appellant's employees took possession of the stove to install and test it and the fire occurred while they were lighting it after they had installed it.

Roselip v. Raisch (1946) 73 C.A. (2d) 125, 166 P. (2d) 340.

It was the testimony of Charles, that at the time he ordered the stove from appellant, appellant agreed to install it (T. 39). Although Charles sent Herold's employee, Albers, for the stove and Albers hauled the crated stove to the office and removed the

top of the crate to look at the heater, Albers did not do any other act towards the installation or ignition of the stove (T. 29). Charles did not install the stove himself or instruct any of the other three men employed by Herold's to install the stove, and as far as Charles knew they did not assist appellant in installing the stove. Further, Charles did not instruct Gregory how to install the stove (T. 162-164).

Appellant sent Lemos to Herold's with the service pickup truck with the fittings necessary to install the stove. Lemos arrived at Herold's shortly after lunch (T. 116). In order to give Herold service, Lemos connected the tubing to the oil storage drum outside the office, filled the drum, put a valve on the copper tubing and connected it to the drum, and ran the tubing under the building and through the floor (T. 105-108). Between 2:00 and 3:00 P.M., appellant's regular stove installer, Gregory, arrived at Herold's (T. 129). Around 4:00 P.M., Jack arrived at Herold's and entered the office and saw Gregory and another man, whom he could not identify, working at the stove (T. 64, 69). Since Lemos admitted that he remained at Herold's until around 4:00 P.M. (T. 116), the court was entitled to infer that such unidentified man was Lemos. Shortly before 5:00 P.M., Jack reentered the office and saw Gregory and Lemos working at the stove. He saw Gregory wipe up the floor under the stove with a rag, then light a match and throw it into the port of the stove, which act was immediately followed by a puff and the fire appeared under the stove (T. 67).

On the 27th day of October, 1947, in the presence of appellant, Gregory informed O'Malley, an investigator, that he completed the installation of the stove, connected the tubing to the stove, ran the oil into the stove, ignited a match and threw it into the port of the stove and the fire occurred (T. 149-152), and neither Gregory nor appellant denied such statements to O'Malley (T. 140, 167).

When asked by the trial court to explain his presence at Herold's, Gregory said that since appellant had sold the stove, he was there to take care of things in case anything would happen or go wrong with the stove (T. 137-138).

Building contractor Wold testified that he instructed his men not to have anything to do with the installation of the stove and that they did not install it (T. 124).

Charles testified that Herold did not have any stove pipe and the stove pipe was to be furnished by appellant, and that Herold did not furnish it (T. 163, 165).

In view of the evidence, it is clear that appellant's employees, who had installed heaters for appellant in the past, were in possession of the stove from around 1:00 P.M. to shortly before 5:00 P.M. when the fire occurred, making the necessary connections for the installation of the stove, turning on the flow of the oil and igniting and throwing the match into the stove, which immediately resulted in the fire. What greater degree of possession and

control of the stove could anyone have had than such control and possession by appellant's employees?

2. Heating appliance is a dangerous instrumentality.

Unless heating equipment is properly installed, controlled and tested, it is a dangerous instrumentality,

Roselip v. Raisch (1946) 73 C.A. (2d) 125, 166 P. (2d) 340.

If a stove is properly installed, controlled and tested, it will not cause a building to take fire within seconds after a lighted match is tossed into it to ignite the stove.

3. Burden on appellant to show fire not caused by his negligence.

When the doctrine of *res ipsa loquitur* is applied, an inference of negligence arises against appellant and it becomes appellant's duty to show that the fire occurred without negligence on his part. Appellant has not offered any evidence to show what caused the fire under the stove in the area his employee Gregory had just wiped up, and Gregory's testimony that he did not know what caused the fire does not constitute a defense.

Williams v. Field Transportation Co. (1946) 73 A.C.A. 588, 166 P. (2d) 884, 887, Hearing granted 28 C. (2d) 696, 171 P. (2d) 722;

Meyer v. Tobin (1931) 214 Cal. 135, 4 P. (2d) 542;

Ireland v. Marsden (1930) 108 Cal. App. 632, 291 Pac. 912.

Further, a defendant cannot prevail as a matter of law on the basis of testimony as to the defendant's own conduct,

Druzanich v. Criley (1942) 19 C. (2d) 439, 122 P. (2d) 53;

Chutuk v. Southern California Gas Co. (1933) 218 Cal. 395, 23 P. (2d) 285.

or any other possible cause for the accident, which still leaves fairly open the possibility of the negligence originally to be inferred,

St. Clair v. McAlister (1932) 216 Cal. 95, 13 P. (2d) 924—negligence of other driver in collision;

Linberg v. Stanto (1931) 211 Cal. 771, 297 Pac. 9—turning to avoid other automobile.

At pages 7, 9 and 10 of his opening brief, appellant contends that there were a number of possible causes of the fire over which appellant had no control and that the doctrine of *res ipsa loquitur* is not applicable. In the absence of proof of interference by a third party, the liability of the appellant is established by the evidence that at the time of the destruction, the match, wiping rag, stove and stove area were under the control of his employee Gregory,

Roselip v. Raisch (1946) 73 C.A. (2d) 125, at 135, 166 P. (2d) 340.

The evidence does not show that any of the following acts suggested as causes by appellant occurred, namely: "* * * a defective flue, a burning cigaret, spontaneous combustion of a painter's rag * * * or by the either voluntary or careless act of a third person."

In *Roselip v. Raisch* (1946) 73 C.A. (2d) 125, it was stated at page 135 thereof:

> "No person in charge of a dangerous instrumentality can avoid his liability for an injury resulting from its mismanagement because out of a number of probable causes of the injury he may have concluded, and procured witnesses to testify, that the injury was due to cause A and not to cause B. That such instrumentality was under his control at the time of its destructive behavior establishes the liability of the operator in the absence of proof of successful interference by another."

and in *Wright v. Southern Counties Gas Co.* (1929) 102 Cal. App. 656, at page 665, the court stated:

> "In *Van Horn v. Pacific Refining & Roofing Co.,* 27 Cal. App. 105 (148 Pac. 951), the doctrine was applied, and in answer to the appellant's contention that it could not apply by reason of the possibility of some other person being liable, the court used the following language: 'But the appellant contends that because the third possibility exists, the doctrine of *res ipsa loquitur* cannot be given application. In support of this contention counsel for the appellant argues that the mere fact that persons other than the defendant, or its employees, were working in and about the building, and had access to the particular floor where this steam-pipe was located, would be sufficient to prevent the application of the rule, because some one or other of these might possibly have so struck or tampered with this pipe as to have caused the loosening of its cap to such an extent that it would be liable to blow off at any

moment under pressure. We think this argument, unsustained as it is by any semblance of evidence or proof tending to show such interference with this pipe or cap, carries the possibilities in cases of this kind entirely too far.' That was a case in which the plaintiff was injured by the blowing off of a cap placed insecurely upon a steam-pipe. The court further in its opinion goes on to say that if such possibilities are allowed to prevent the application of the doctrine of *res ipsa loquitur,* it would in effect entirely eliminate the doctrine."

Again, in *National Lead Co. v. Schuft* (1949 C.C.A. 8th) 176 F. (2d) 610, at 614, it was said:

"Beyond this, it is to be noted that, while National Lead argues that the possibility of gas having escaped from the pipes or jets used in connection with the conveyors, or of combustible fumes having been formed from the oil used in the bentonite furnaces, is an equally rational theory of proximate cause with that alleged by the plaintiffs, there is no evidence whatever of any such condition of escaped gas or formed oil-fumes having existed in the plant. The same is true of the suggestion that the fire may have been caused by a passing switch engine, and especially so since all the evidence in the record indicates that the fire originated inside the plant. No possible basis therefore can be claimed to exist for the contention that as a matter of law the theory of plaintiffs was not 'inconsistent with any other rational theory.'

"A theory of proximate cause resting in probative circumstances does not become a matter of speculation and conjecture by a mere sug-

gestion of other possible causes which are unsupported by any proved facts. *Sears Roebuck & Co. v. Peterson,* 8 Cir., 76 F. (2d) 243, 247; *Terminal Railroad Ass'n of St. Louis v. Farris,* 8 Cir., 69 F. (2d) 779, 785."

Meyer v. Tobin (1931) 214 Cal. 135, 4 P. (2d) 542.

On the other hand, the evidence established that the following acts suggested as causes by appellant, at pages 7, 9 and 10 of his opening brief, actually were performed by appellant's employee Gregory: "* * * a carelessly thrown match * * * or ignition of the Standard Oil floor hardener then being applied, which was known to be highly inflammable when exposed to normal heat * * *"

CONCLUSION.

The evidence shows that the fire was caused by the negligence of appellant in installing, controlling and testing the heater without taking any precautions against the fire hazard created by the fresh paint, and if the evidence does not support such a finding of specific negligence, then the doctrine of *res ipsa loquitur* is applicable because at the time of the negligent act and at the time of the accident the stove was under the exclusive control of appellant's employees, and such a fire does not ordinarily occur where such employees use proper care in installing, controlling, testing and igniting the heater. Therefore, an inference of negligence arises from such doctrine

against appellant and appellant has not offered any evidence to rebut such inference.

Therefore, it is respectfully submitted that the judgment in favor of each appellee should be affirmed.

Dated, San Francisco, California,
June 14, 1950.

Respectfully submitted,

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No. 12,452

IN THE

United States Court of Appeals

For the Ninth Circuit

SAM GAILBREATH,

Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Appellees.

Appeal from the United States District Court, Northern District of California, Northern Division.

Honorable Dal M. Lemmon, Judge.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S REPLY BRIEF.

PREFACE.

At the outset, counsel in the proper discharge of their relationship to appellant, are first impelled to direct the attention of this Honorable Court to certain, fatal factual weaknesses which do exist in the appellees' cause and to a total lack of even a scintilla of law or fact sufficient to sustain the Judgment of the Honorable United States District Court or to warrant the application of,

(1) The doctrine of "*res ipsa loquitur,*" or a scintilla of proof that,

(2) The fire inside the stove was communicated outside the stove and that the fire in the stove was the direct and proximate cause of the spontaneous ignition of the floor and walls of the building or a scintilla of proof that,

(3) Defendant Gailbreath was guilty of one act of negligence which was the proximate cause of the fire.

At the threshold of Appellant's reply brief, Appellant does feel impelled to direct the Court's attention to the necessity of a clear, concise and accurate epitomization of the facts as established by the evidence. This is universally recognized by the Courts as the first fundamental prerequisite to the writing of a good brief by either party to the controversy for the reason that, where the facts are once clearly understood, the law generally is comparatively easy, and a case well stated is more than half argued.

A FACTUAL CLARIFICATION.

A. The chimney and flue were not installed or controlled by Appellant but were installed and under the control of Appellees.

The evidence does conclusively establish without the slightest suggestion of contradiction or innuendo of impeachment that the Herold Lumber Company,

and not Appellant Galbreath did furnish and install the flue, chimney or stovepipe.

Witness Charles W. Little, employed by Appellees, insured (the Herold Lumber Company) to operate the lumber business, did testify as follows:

Q. Well, there was no stovepipe listed on the invoice, is there?

A. I noticed that.

Q. Do you think you used some stovepipe of your own there?

A. Well, that I can't answer.

Q. You don't know.

A. If there was some——

Q. Do you know who installed the stovepipe?

A. The stovepipe?

Q. Yes.

A. Or the flue?

Q. The stovepipe or the flue?

A. Or the flue?

Q. The stovepipe.

A. The stovepipe from the stove to the flue?

Q. Yes.

A. I do not. (T. 62.)

The sales invoices do establish that Appellant Gailbreath did not sell or deliver any stovepipe or chimney to the Herold Lumber Company. See Plaintiff's Exhibit 1. T. Page 40 and Plaintiff's Exhibit 3. T. Page 47.

Appellees' witness Roy Albers, an employee of the Appellees' insured, testified he took delivery of the stove from Appellant Gailbreath at the request of

his superior Charles W. Little and did further testify as follows:

Q. Now, did you get any stovepipe with the stove?

A. No, sir. (T. Page 31.)

The Appellant Gailbreath testified as follows:

Q. Did you deliver any stovepipe for this stove?

A. No.

Q. Was any ordered from you?

A. No. (T. Page 15.)

The witness Cerino Lemos, an employee of the Appellant Gailbreath, did testify as follows:

Q. Did you see any workmen there?

A. Yes, there was one in particular. He was putting up this chimney. I asked him if he was having difficulties in putting the chimney pipe or the stovepipe through the wall. He was to head up this chimney stack something. I didn't pay much attention because my instructions was to put the drum down there and fill it up, not to install it.

Q. In other words, these workmen were installing the pipe, the stovepipe which led from the stove to the flues?

A. Yes, sir.

Mr. Castro. He said one workman. I didn't understand him to say more than one.

Mr. Desmond. Q. How many workmen were there, Mr. Lemos?

A. Well, if you want to be identical about it, I would say there were about two painters. This boy particularly was working on the stovepipe.

That makes a total of three. And probably one of the light men, and that makes about five, guys in the middle office, so it would make a total of seven men now. I don't know for sure and who was doing what. (T. Page 109.)

Witness Charles W. Little testified the Herold Lumber Company had four employees working on the the premises the day of the fire.

Q. How many employees did you have at the Herold Lumber Company on the day of the fire?
A. Four. (T. Page 162.)

Lars Wold, an employee of Appellees' insured Herold Lumber Company, installed the FLUE which testimony stands unimpeached.

Q. I see, all right. Now, Mr. Wold, did you install the flue?
A. Yes, sir. (T. Page 122.)

B. The Standard Oil Floor Hardener had been freshly applied, was still wet and was highly combustible.

CHARLES W. LITTLE, Business Manager of the Herold Lumber Company, testified as follows:

By Mr. Desmond:

Q. Are you familiar with the type of material that is known as Standard Oil Floor Hardener?
A. Well, no, not too familiar with it.
Q. Do you know whether or not it is inflammable?
Mr. Castro. OBJECTS——
The Court. OBJECTION OVERRULED.
A. I would say it was. (T. Page 63.)

The witness Charles W. Little did further testify:

Q. Now, what time was the office painted?

A. Well, it was painted the day before. I am not sure but what some of it had been done the day before that.

Q. Was any of it painted on the morning of the fire?

A. There was a little patch of floor in back of the door in front of the counter that hadn't been painted. (T. Page 56.)

LARS WOLD, an employee of Appellees' insured Herold Lumber Company, did testify as follows:

Q. Now, do you—what do you know anything about this material Standard Oil Floor Hardener?

A. IT'S INFLAMMABLE. (T. Page 122.)

On the day of the fire Lars Wold testified as to the following circumstances.

Q. Do you know what they were doing?

A. Sir? They were painting, but I am not sure.

Q. Do you know what sort of paint they were using?

A. Standard Oil Hardener.

Q. Where were they applying it?

A. I am not sure. I think it was the walls. He had the floor all painted in.

Q. What do you recall about the floor?

A. He had boards. We had to walk on boards there so we wouldn't take the stuff up. (T. Pages 121-122.)

C. There is no testimony as to the flash point of Standard Oil Floor Hardener.

The Appellees have resorted to the extremity of announcing to this Court that the testimony does establish 105 degrees Fahrenheit as the Flash Point, *mind you, FLASH POINT,* of Standard Oil Floor Hardener. To accomplish this purpose they have sought to utilize the insidious approach of Appellees' offer to stipulate, which offer stands unaccepted by Appellant.

> Mr. Castro. We will stipulate to it, Counsel, we have no objection to it, Your Honor. It was painted with STANDARD OIL FLOOR HARDENER which was provided by Sherwin-Williams Company and sold as a Standard Oil Product. The point of inflammation is 105 Fahrenheit. The flash point is 105 degrees. (T. Page 76.)

D. Gailbreath and his employees did not know Standard Oil Floor Hardener had been applied or that it was highly explosive.

In their abortive effort to seek application of the "*res ipsa loquitur* doctrine," Appellees have again reached out to the utmost limits of legal inference when they charge on page (6) of their Brief viz.: "*Appellant had full knowledge concerning painting which was done on the day of the fire in the office.*"

Suffice it to say that Gailbreath's employees saw a liquid being applied to the floor and walls of the office on the day of the installation by employees of the insured, Herold Lumber Company. Albeit that the evidence establishes the foregoing fact, then in the

absence of even an iota of additional evidence, by what processes of legal legerdemain can it be inferred that Gailbreath or his employees had analytical knowledge of the contents of the liquid being applied to the walls and floor by the Herold Lumber Company? If they assumed it to be an oil base paint, then it is common knowledge that the direct flame of a gas torch will not ignite such a substance when contained in a pot or spread on walls.

E. This was the instance of an explosive flash fire which occurred unconnected from the fire within the stove and was not the slow process of heat igniting a wooden structure.

After reading the supra testimony, it would be logical to conclude that the highly inflammable Standard Oil Floor Hardener had on the day of the fire been applied to the walls adjacent to the stove and to the floor immediately adjacent to the stove and that this highly combustible liquid was wet at the time of the fire. Then, *if the fire was an explosive, flash fire, it must follow as a corollary that the inflammability and explosive qualities of the Standard Oil Floor Hardener were the proximate cause of the fire and not the stove or its contents.*

JACK E. LITTLE, an employee of the Appellees' insured Herold Lumber Company, testified as follows:

Q. And then what happened?

A. *Well, almost immediately after it, I hung up the 'phone which I did as soon as I saw the fire. The fire started up the inside of the wall. It traveled up the wall like a raising curtain. It*

almost immediately SPREAD THE FULL WIDTH OF THE ROOM, WENT UP the wall and across the ceiling and started down the other sides.

Q. *And then did you leave it?*

A. *I went out on my hands and knees.* (T. Page 68.)

If the explosive and highly inflammable Standard Oil Floor Hardener had not been applied on the day of the fire, could it be reasonably presumed that a fire burning in a steel enclosed Customaire stove, and which fire, by the entire evidence, was never directly communicated from the interior of the stove to the exterior of the stove, have caused the instantaneous conflagration that was so abrupt in its origin that Witness Jack E. Little was compelled as an act of self-preservation to crawl out of the building on his hands and knees? When the witness characterized this fire as traveling up the wall like a raising curtain; then does not this fire suggest one that had its derivation in an inflammable oil base liquid that had been freshly applied to the floor and walls? If this be the fact, then how did combustible substance become ignited in the absence of communication of the fire within the stove to the flash fire on the floor and walls? Then, if so, would Gailbreath be chargeable with the negligence of Appellants in applying or throwing an explosive substance in the vicinity of stove, which subsequently ignited from an unknown source? The negligent and perilous act of Appellees' insured in their imprudent application of the Standard Oil

Floor Hardener was the proximate cause of the flash fire that no man could extinguish.

F. Who furnished and installed the damper?

A perusal of the entire record will offer no clue to a solution of the supra interrogatory. It is common knowledge that a wood, oil or coal burning stove must have a damper. In the instance of any of the aforesaid stoves, the damper must be properly adjusted or a "HARMLESS PUFF" will result as the firebox breathes for oxygen.

In the case at bar, Appellant Gailbreath was the only witness who testified as to the damper.

> Q. Does that damper affect the amount of heat in the stove?
>
> A. Oh, yes. Oh, yes, it affects the distribution of the heat.
>
> Q. Did you deliver or sell to the lumber company that day any of those pipe connections or any of those dampers?
>
> A. No, sir. (T. Page 144.)
>
> Q. I see; and if the damper were not on the pipe, were not properly installed, would the pipe above the stove become hot?
>
> A. Yes, despending on the strength of the flue. It would become extremely hot if the flue was very strong. It would go up maybe three or four joints of extreme heat. (T. Pages 144-145.)

As a direct consequence, it would follow that the proper installation of the chimney, stovepipe and flue is just as necessary to the proper functioning of a "Customaire Oilburner" as the stove itself.

THE EVIDENCE DOES NOT ESTABLISH BY INFERENCE OR INNUENDO THAT THE FIRE WITHIN THE STOVE CAUSED THE FIRE OUTSIDE THE STOVE.

Appellees have rested their entire cause upon the "*res ipsa loquitur* doctrine" by reason of the fact that a fire had been burning within an oil stove and an employee of Gailbreath took a rag and wiped something from the floor—the origin of which has never been revealed—then a puff occurred, followed shortly thereafter by a flash, explosive, instantaneous fire that went up the walls like a curtain and forced the witness Charles W. Little to leave the room on his hands and knees.

The operational function of the stove was completely normal unless the "puff" would be considered unorthodox. This function was described as a puff and was apparently unaccompanied by any transmission of flame from the interior firebox to the exterior outside of the stove. Such a function on a damper controlled stove has occurred down through the ages in the instance of (1) The old woodburning stove in the farmhouse kitchen, (2) The old "pot bellied" coalburning stove in the country store, and (3) The more modern oil burning stove now used in home and office, all without any harmful results arising therefrom. By what factual phenomena did the fire within the stove cause the ignition of the floors and walls outside of the stove?

If the doctrine of "*res ipsa loquitur*" cannot be applied to the instant case, then have Appellees established that a specific act of negligence occurred on

the part of Appellant, or that such act was the proximate cause of the fire other than by conjecture, surmise, speculation, guess or the processes of a prejudiced imagination?

At the risk of being repetitious, we should again not be unmindful of the prevailing weight of authority to the effect that "The destruction of property by fire either upon the premises where it starts or is kindled on other property to which it is communicated, does not raise a presumption of negligence in either the kindling or management of the fire."

(See Seven Authorities Cited Page 13, Appellant's Opening Brief.)

The Roman-Anglo-American-California interpretation of the rule of *"res ipsa loquitur"*, which had its origin in the year one, has never been extended to property destroyed by fires either upon the premises where the fire originated, or on other property to which it is communicated.

California is in harmonious accord with the supra, prevailing rule, and has never extended the doctrine to a "fire". In California, civil liability for wrongful destruction of property by fire has always been predicated upon the law of negligence and the rule of ordinary care, requiring the plaintiff to prove (1) The negligent act, (2) The proximate cause, by the preponderance of the evidence and without the aid of the doctrine of *"res ipsa loquitur"*, for the reason that it is generally not unlawful to set a fire.

12 *Cal. Jur.* 524.

If the general law of negligence was applied to the instance of several automobiles being driven on a public highway which adjoined a ripe barley field during which period one of the automobiles backfired and shortly thereafter the field ignited and burned, then in the absence of additional facts, or the absence of sparks or some other causal connection, could this Court hold the owner of the backfiring automobile responsible upon the theory that negligence and proximate cause had been established? If the answer is in the negative, then are not the facts in the case at bar and the supra, automobile illustration of similar probative value, and shouldn't recovery be denied in either instance?

RES IPSA LOQUITUR IS NOT APPLICABLE.

Before the *res ipsa loquitur* doctrine can be applied Appellees must first establish, by a preponderance of the evidence, that the alleged dangerous instrumentality (the stove) was the proximate cause of the fire, and Second, That the instrumentality complained of, the stove and its accessories, were under the exclusive control of the Appellant.

If the Court finds that the fire was a sudden flash, explosive, instantaneous fire that suddenly enveloped the entire room, then it must be concluded that the combustible Standard Oil Floor Hardener was ignited and the Court may properly conclude that if the Standard Oil Floor Hardener had not been applied by Appellees or had dried prior to the day of

the fire, then the office building would have never been destroyed. Query, how was the Standard Oil Floor Hardener ignited? The answer to this interrogatory shall forever remain a mystery coupled with the fact. There is a complete absence of testimony, direct or indirect, primary, secondary, or circumstantial, as to how the fire could have been communicated from the inside of a steel enclosed stove to the floor and walls, except by conjecture.

> "It is not only necessary to show that the offending instrumentality was under the management of the defendant but it must be shown that it proximately caused the injury."
>
> 38 *Am. Jur.* 300, citing California cases.

If we are to indulge ourselves in the doctrine of probabilities, then we may as reasonably infer that the highly inflammable Standard Oil Floor Hardener, which was applied by the insured Herold Lumber Company, was ignited,

1. By a carelessly thrown match.

2. A burning cigarette.

3. The rays of the sun being focussed through a glass pane.

4. The voluntary act of one of Appellees' employees.

5. Spontaneous combustion.

6. A flue defectively installed by the Appellees.

7. A chimney defectively installed by the Appellees.

8. A damper defectively installed by Appellees.

9. Defective wiring.

10. An incandescent lamp.

In the case of *White v. Spreckels,* 10 Cal. App. 288, the defendant John Spreckels leased an office in his building and agreed to furnish steam heat from his boiler to the radiator in the office. The plaintiff was burned by escape of steam and hot water when the radiator exploded, whereupon the Court denied plaintiff application of the *res ipsa loquitur* doctrine and we do, infra, paraphrase the language of the Court.

"If we rely on the doctrine of probabilities we might as reasonably infer that the fire was caused by the spontaneous combustion of the highly combustible Standard Oil Floor Hardener or by reason of Appellees' faulty installation of the flue, chimney, or damper as to conclude that by some feat of sorcery a spark or flame escaped from the stove and ignited the Standard Oil Floor Hardener."

It is apparent that the installation commencing with the fuel tank and ending with the flue did comprise several units any one of which was essential to the successful operation of the stove. It is also manifest from the record that there was a division of responsibilities in the installation and management of the various units. The Appellees did install, manage and control the flue, chimney platform for the fuel tank and some person did install and control the damper. The Appellant did perform some acts of installation

on the stove proper. Certainly, the Appellant could not be made the absolute insurer for such defects that may have existed in the flue or chimney, he having never owned, possessed, installed or had any knowledge of the quality or installation of these units. Nor did he ever contract to assume such responsibility.

Again we are reminded of the California application of the doctrine as announced in the case of *Gerhart v. Southern Cal. Gas Co.,* 56 C.A. (2d) 245, infra,

> "It has often been held that where all of the instrumentalities which might have caused an accident, were not under the control of the defendant, the doctrine cannot apply".

Also see,

Godfrey v. Brown, 220 Cal. 57.

THE CASES CITED BY APPELLEES.

After reading and analyzing the cases cited by Appellees, it is apparent that they are relying to a large extent upon the facts and law as announced in the case of *Roselip v. Raisch,* 72 Cal. App. (2d) 125. This case is readily distinguishable from the facts in the instant case for the reason that in the *Roselip* case all of the elements of control of the dangerous instrumentality were established. The defendants had leased an asphalt plant from plaintiff and defendants did replace a wood heating unit with an oil burner, did make certain modifications in the plant and were in

full and sole control of the premises when the heating unit under the fuel oil tank did ignite, and the flames which spread from the furnace did destroy adjoining property of the plaintiff.

Also, in the *Roselip* case, it was proven that the defendant knew that the fuel oil plant generated inflammable gases which would pass off under the influence of heat, which in turn would be ignited by a flame, *and it was clearly established that the flames had their origin in the fire box, chimney and asphalt tank of defendant.*

The case of *Wright v. Southern Counties Gas Co.,* 102 Cal. App. 656, cited by Appellees, was one wherein escaping gas exploded in an apartment house.

The case of *Van Horn v. Pacific Refining & Roofing Co.,* 27 Cal. App. 105, cited by Appellees, was one wherein a cap blew off a steam pipe and steam and water escaped, to the injury of plaintiff. It is also interesting to note that in the *Van Horn* case the evidence did conclusively establish that none other than defendants' employees ever touched or tampered with the pipe and that the pipe, cap and escaping steam and water was the sole cause of plaintiff's injuries.

Our avenues of legal research fail to disclose that Appellees have cited one case involving the application of the *res ipsa loquitur* doctrine to the instance of a heating stove and burning of a building, while Appellant has cited three stove cases, see infra, all of which hold that a stove is not a dangerous instru-

mentality and that the doctrine of *res ipsa loquitur* cannot be applied.

Watenpaugh v. L. L. Coryell & Son, 283 N.W. 204 (Neb.);

McCabe v. Boston Consol. Gas Co., (Mass.) 50 N.E. 640;

Le Zotte v. Lindquist, 212 N.W. 503 (South Dakota).

CONCLUSION.

The Appellees have requested that this Court indulge itself in a nebulous application of the *res ipsa loquitur* doctrine to the facts of the instant case even though there is not one shred of evidence connecting the fire in the stove with the fire in the building. While it must be conceded that the law is a growing organism, nevertheless an interpretation of it in this instance must result in a definite and well established cleavage between the burden of proof in a negligence case and the doctrine of *res ipsa loquitur.* To do otherwise and extend the doctrine to the Appellees in the instant case would serve to bring chaos out of lucidity and order. If the doctrine is extended in this case we have grave doubt if any student of the law of negligence would be able to reconcile the doctrine of *res ipsa loquitur* and its application to a stove case.

If the doctrine is applied in this action and the judgment is affirmed, then the legal requirements of evidentiary proof in a negligence action have been for-

ever removed from posterity and the plaintiff can prove his case by simply establishing the following coincidence, a fire was burning in a stove when a building became ignited.

It is, therefore, respectfully submitted that the findings of fact made by the lower Court are without evidentiary support and that the judgment herein should be reversed.

Dated, Sacramento, California,
August 14, 1950.

Respectfully submitted,
EARL D. DESMOND,
E. VAYNE MILLER,
K. D. ROBINSON,
Attorneys for Appellant.

No. 12454

United States
Court of Appeals
For the Ninth Circuit.

THE LONDON ASSURANCE, a corporation,

Appellant,

vs.

LOUIS P. LUTFY and BERTHA A. LUTFY, Husband and Wife,

Appellees.

Transcript of Record

Appeal from the United States District Court
District of Arizona.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12454

United States
Court of Appeals
For the Ninth Circuit.

THE LONDON ASSURANCE, a corporation,

Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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INDEX PAGE

ATTORNEYS OF RECORD

KRAMER, MORRISON, ROCHE & PERRY,

309 First National Bank Building,
Phoenix, Arizona,

Attorneys for Appellant.

STRUCKMEYER & STRUCKMEYER,

Luhrs Building,
Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court
For the District of Arizona

No. Civil 1173 Phx.

LOUIS P. LUTFY and BERTHA A. LUTFY, husband and wife,

Plaintiffs,

vs.

THE LONDON ASSURANCE, a corporation,

Defendant.

TRANSCRIPT ON REMOVAL

In the Superior Court of the State of Arizona
In and for the County of Maricopa

No. 60158, Div. 3

LOUIS P. LUTFY and BERTHA A. LUTFY, husband and wife,

Plaintiffs,

vs.

THE LONDON ASSURANCE, a corporation,

Defendant.

COMPLAINT

The plaintiffs allege:

I.

The plaintiffs are husband and wife and are residents of Maricopa County, Arizona; the defendant,

during all times mentioned herein, was and now is a corporation organized and existing under and by virtue of an English Royal Charter, and having its principal place of business in the City of London, England. The defendant is permitted to and at all times herein mentioned was permitted to write insurance upon automobiles in the State of Arizona.

II.

On the 19th day of September, 1947, in Phoenix, Arizona, the defendant undertook to insure, and did insure, the plaintiffs against any loss arising from the theft of one certain automobile described as follows:

1947 Lincoln Continental C o n v e r t i b l e Coupe Serial Number H-150200, Motor Number H-150200 and charged to the plaintiffs, and received therefrom, the sum of $159.00 as and for premium charged for the said insurance undertaken.

The said policy contained the following conditions, to-wit: That the property insured under said policy was of the value of $5,420.00 on the date on which the said policy issued and that in case of total loss the defendant would pay to the plaintiffs the actual cash value of the said automobile. The said policy included also equipment carried in the said automobile as part of the normal equipment which said equipment on the date hereinafter alleged was of the reasonable value of $77.00.

III.

On or about the 28th day of October, 1947, the said automobile was stolen from the possession of the plaintiffs and has not been recovered by the plaintiffs and the plaintiffs have thereby been permanently deprived of the use and enjoyment of said motor vehicle which upon the date given above was of a value in excess of $5,420.00. By the said policy the defendant undertook and agreed to reimburse the insured for expenses not exceeding $5.00 for any one day or totaling $150.00 for rental of a substitute automobile, including taxi cabs. The plaintiffs have incurred expenses in excess of $150.00 for rental of substitute automobiles, including taxi cabs since the said loss.

On or about the 28th day of October, 1947, and while the said policy was in full force and effect, the said automobile and its entire equipment, insured as aforesaid, while in the City of Phoenix, Maricopa County, Arizona, were totally loss by the theft thereof by persons other than those in the employment, service or household of the plaintiffs.

IV.

The plaintiffs have done and performed all of the conditions of the insurance policy between the parties as required by them and the defendant has notified the plaintiffs that the defendant does not intend to pay and will not pay the liability incurred upon the said policy of insurance, and will pay nothing on account of said policy.

Wherefore, the premises considered, plaintiffs pray judgment against the defendants in the sum of $5,647.00 with interest at the rate of 6% thereon, and the further sum of $1,500.00 as and for attorneys' fees, together with their costs herein incurred.

STRUCKMEYER &
STRUCKMEYER,
By JAMES A. STRUCKMEYER,
Attorneys for Plaintiffs.

State of Arizona,
County of Maricopa—ss.

Louis P. Lutfy, being first duly sworn upon his oath, deposes and says: That he is one of the plaintiffs in the above entitled matter and has read the above and foregoing complaint and knows the contents thereof and the matters alleged therein are true of his own knowledge, except those matters alleged upon information and belief, and as to those matters he believes them to be true.

LOUIS P. LUTFY,
Plaintiff.

Subscribed and Sworn to before me this 23rd day of March, 1948.

[Seal] MARJORIE F. GOLDBERG,
Notary Public.

My Commission expires October 22, 1948.

[Endorsed]: Filed Mar. 25, 1948.

[Title of Superior Court and Cause.]

SUMMONS

(Copy)

The State of Arizona to the above named defendant, The London Assurance, a corporation, (serve member of the Corporation Commission).

You Are Hereby Summoned and required to appear and defend in the above entitled action in the above entitled court, within Twenty Days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within Thirty Days, exclusive of the day of service, if served without the State of Arizona, and you are hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The name and address of plaintiffs' attorneys: Struckmeyer & Struckmeyer, 207 Luhrs Building, Phoenix, Arizona.

Given under my hand and the seal of the Superior Court of the State of Arizona in and for the County of Maricopa, this .... day of March, 1948.

WALTER S. WILSON,
Clerk.

[Seal] By ERNEST R. MORRIS,
Deputy Clerk.

[Title of Superior Court and Cause.]

APPLICATION FOR SPECIAL APPOINTMENT TO SERVE PROCESS, AND ORDER OF APPOINTMENT

Now comes James A. Struckmeyer attorney for Plaintiff in the above entitled and numbered cause and making application for the appointment of Roger W. Perry for the purpose of serving process herein, says; that the said Roger W. Perry is a male citizen of the United States and a resident of the County of Maricopa, State of Arizona, of the age of twenty-one years and upwards, not interested in the above entitled cause and is competent to be a witness in said cause; that a substantial saving in travel fees will result.

Wherefore, James A. Struckmeyer, attorney as aforesaid, moves for an order of the court specially appointing the said Roger W. Perry the purpose of serving process in the above entitled and numbered cause.

Dated 26 March 1948, *194....*

JAMES A. STRUCKMEYER,
Attorney for Plaintiff.

Upon the matter set forth in the application of James A. Struckmeyer, attorney for Plaintiff, duly filed herein on the 26th day of March, 1948.

On motion of James A. Struckmeyer attorney as

aforesaid, Roger W. Perry, be and he is hereby specially appointed for the purpose of serving process in the above entitled and numbered cause.

WALTER S. WILSON,
Clerk.

[Seal] By CLIFFORD H. WARD,
Deputy.

[Endorsed]: Filed Mar. 26, 1948.

[Title of Superior Court and Cause.]

AFFIDAVIT

State of Arizona,
County of Maricopa—ss.

Roger W. Perry being first duly sworn deposes and says:

That he is a citizen of the United States; a resident of Maricopa County, State of Arizona; is over the age of twenty-one years, and is not interested in the above entitled cause.

That the within Summons was received by him on the 26th day of March, 1948, at the hour of 2:30 p.m.; that he personally served same on the 28th day of March, 1948, on The London Assurance,

(Corporation Commission, State of Arizona)

being defendant named in said Summons, by delivering to said London Assurance personally in Maricopa County, Arizona, a true copy of said

Summons to which was attached a true copy of the complaint mentioned in said summons.

ROGER W. PERRY.

Subscribed and sworn to before me this 29th day of March, 1948.

[Seal] MARJORIE F. GOLDBERG,
Notary Public.

My Commission expires Oct. 22, 1948.

[Endorsed]: Filed Mar. 31, 1948.

[Title of Superior Court and Cause.]

NOTICE OF FILING PETITION AND BOND ON REMOVAL

To the Plaintiffs above named, and to Messrs. Struckmeyer & Struckmeyer, their Attorneys of Record:

You And Each Of You are hereby notified that the defendant, The London Assurance, a corporation, will on the 14th day of April, 1948, at the hour of nine-thirty o'clock in the forenoon thereof, file in the above numbered and entitled action its petition for the removal of said cause to the United States District Court for the District of Arizona, accompanied by a bond on removal conditioned according to the Act of Congress relating to removal

of causes, a copy of which such petition and bond is attached hereto and served upon you herewith.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for Defendant.
By ALLAN K. PERRY.

Receipt of copy acknowledged.

[Endorsed]: Filed Apr. 14, 1948.

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Superior Court of the State of Arizona, County of Maricopa, and the Judges Thereof:

Your petitioner, The London Assurance, comes now by its attorneys, Kramer, Morrison, Roche & Perry, and respectfully petitions and shows unto the Court as follows:

1. That the plaintiffs, Louis F. Lutfy and Bertha A. Lutfy are citizens and residents of the State of Arizona; that this defendant-petitioner is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain and is a corporate subject and resident of said Kingdom.

2. That the time within which this petitioning

defendant is required by the laws of the State of Arizona and the rules and practice of this Court to move, answer, or otherwise plead in the above numbered and entitled suit has not yet expired, and this petitioning defendant has not filed any pleading or appeared in any way herein.

3. That by the complaint of plaintiffs on file herein, said plaintiffs seek judgment against the defendant in the sum of Five Thousand Six Hundred Forty-seven Dollars ($5,647.00), which plaintiffs claim and assert the defendant owes to them by virtue of a written contract of insurance, and the further sum of Fifteen Hundred Dollars ($1,500.00) as and for plaintiffs' attorneys' fees in said cause. This petitioning defendant denies that it is liable to the plaintiffs, or either of them, under the complaint as filed in the above numbered and entitled action, or at all, and does most respectfully show unto the Court that the amount in controversy in said action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00), and that this is a suit of a civil nature between citizens and residents of the State of Arizona as plaintiffs and a subject and resident of the Kingdom of Great Britain as defendant.

4. This defendant-petitioner has made and does file herewith a bond in the sum of Two Hundred Fifty Dollars ($250.00), with good and sufficient surety, conditioned upon its entering in the United States District Court for the District of Arizona,

within thirty days from the date of the filing of this petition, a certified copy of the record in this suit and its paying all costs that may be awarded by said District Court if it shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, this petitioning defendant prays that this Court proceed no further herein, except to approve and accept said bond and to cause the record herein to be removed to the United States District Court for the District of Arizona, as does the law require.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for
Defendant-Petitioner.
By ALLAN K. PERRY.

State of Arizona,
County of Maricopa—ss.

Allan K. Perry, being first duly sworn according to law, on oath deposes and says:

1. I am one of the attorneys for the defendant-petitioner in whose behalf the foregoing petition is filed;

2. Said defendant-petitioner is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and is a corporate resident and subject of said Kingdom;

3. There is no officer of said alien corporation within the State of Arizona;

4. I make this affidavit for and on behalf of said alien corporation, having been first thereunto duly authorized;

5. I have read the foregoing petition and know the contents thereof, and that each and all of the matters and things therein stated are true of my own knowledge.

ALLAN K. PERRY.

Subscribed and sworn to before me this 12th day of April, 1948.

[Seal] AMY SWEEM,
Notary Public.

My commission expires May 29, 1948.

[Endorsed]: Filed Apr. 14, 1948.

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents:

That The London Assurance, a corporation, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and authorized to become and be sole surety upon bonds required in judicial proceedings within the State of Arizona and in the

United States District Court for the District of Arizona, as Surety, are held and firmly bound unto Louis P. Lutfy and Bertha A. Lutfy, husband and wife, in the penal sum of Two Hundred Fifty Dollars ($250.00), lawful money of the United States, for the payment of which said sum well and truly to be made, said Principal binds itself and its successors and assigns, and said Surety binds itself and its successors, jointly and severally, firmly by these presents.

The Condition of this obligation is such that:

Whereas, the principal obligor has applied by petition to the Superior Court of the State of Arizona in and for the County of Maricopa for the removal of the above numbered and entitled cause therein pending to the United States District Court for the District of Arizona upon the grounds in said petition set forth,

Therefore, if the said Principal, The London Assurance, shall enter in said United States District Court for the District of Arizona, within thirty days from the date of the filing of its said petition for removal, a certified copy of the record of said Superior Court in the above numbered and entitled action and shall pay all costs that may be awarded by said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, to remain in full force, effect and virtue.

Witness the corporate name of the principal obligor, by its duly authorized attorney, and the

corporate name and seal of the Surety, by its duly authorized attorney-in-fact, all this 13th day of April, 1948.

THE LONDON ASSURANCE.
By ALLAN K. PERRY,
Its Attorney.
Principal.
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
[Seal] By /s/ C. A. DRUMMOND,
Its Attorney-in-Fact.
Surety.

[Endorsed]: Filed April 14, 1948.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

The defendant, The London Assurance, having within the time prescribed by law filed its petition for the removal of the above numbered and entitled cause to the United States District Court for the District of Arizona, and having at the same time offered its bond in the sum of Two Hundred Fifty Dollars ($250.00) with Fidelity and Deposit Company of Maryland, a corporation, as good and sufficient surety, pursuant to the statute and conditioned according to law,

Now, Therefore, this Court does hereby accept and approve said bond, and does hereby accept said petition, and

It Is Ordered that this cause be and it is hereby removed to the United States District Court for the District of Arizona, and that all other proceedings in this Superior Court be and the same are hereby stayed.

Done In Open Court this 14th day of April, 1948.

DUDLEY W. WINDES,
Judge.

[Endorsed]: Filed April 14, 1948.

[Title of Superior Court and Cause.]

THIS MATTER BEFORE THE HONORABLE DUDLEY W. WINDES, PRESIDING JUDGE

Comes now Allan K. Perry, of Kramer, Morrison, Roche & Perry, appearing as counsel on behalf of the Defendant.

It is ordered for removal of this cause to the United States District Court and staying all further proceedings in the Superior Court.

[Title of Superior Court and Cause.]

State of Arizona,
County of Maricopa—ss.

I, Walter S. Wilson, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the aforegoing to be a full, true and correct copy of the record, and the whole thereof, in the

above entitled cause heretofore pending in the Superior Court of Maricopa County, Arizona, being cause No. 60158, wherein Louis P. Lutfy and Bertha A. Lutfy, husband and wife, were Plaintiffs and The London Assurance, a corporation, was Defendant, said record consisting of:

Complaint .....filed March 25, 1948
Affidavit .....filed March 31, 1948
Application for Special Appointment
to Serve Process and Order of
Appointment .....filed March 26, 1948
Notice of Filing Petition and
Bond on Removal .....filed April 14, 1948
Petition for Removal .....filed April 14, 1948
Bond on Removal .....filed April 14, 1948
Order for Removal .....filed April 14, 1948

and Minute Entry of April 14, 1948, granting Defendant's motion for removal, all as appears in the files and of record in my office.

Attest my hand and Seal of said Court at Phoenix, County of Maricopa, State of Arizona, this 19th day of April, 1948.

[Seal] /s/ WALTER S. WILSON,
Clerk of the Superior Court,
Maricopa County, Arizona.

Transcript on Removal in the Superior Court of the State of Arizona in and for the County of Maricopa.

[Endorsed]: Filed May 7, 1948, U.S.D.C.

In the United States District Court for the District of Arizona

No. Civ. 1173 Phx.

LOUIS P. LUTFY and BERTHA A. LUTFY, husband and wife,

Plaintiffs,

vs.

THE LONDON ASSURANCE, a corporation,

Defendant.

AMENDED ANSWER

I.

Defendant admits the allegations contained in paragraph I of the plaintiffs' complaint.

II.

Defendant denies each and every allegation contained in paragraph II of the plaintiffs' complaint that is not herein expressly admitted. Defendant admits and alleges that on or about the 19th day of September, 1947 the defendant issued to the plaintiffs a certain policy of insurance wherein and whereby defendant did, subject to all of the terms and conditions in said policy contained, agree to indemnify plaintiffs for a term commencing the 19th day of September, 1947 and expiring by limitation the 19th day of September, 1948 against loss or damage to the plaintiffs resulting directly from the theft of a certain Lincoln Continental Con-

vertible Coupe, Year Model 1947, Motor No. H-150200, to the extent of the actual cash value of such automobile or of the damage thereto resulting from theft as aforesaid, and as in said policy defined, as of the day of the date of such loss or damage.

III.

Defendant denies each and every allegation contained in paragraph III of the plaintiffs' complaint.

IV.

Defendant admits the allegation contained in paragraph IV of the plaintiffs' complaint to the effect that defendant denies it is liable to the plaintiffs in any sum whatsoever under the claim by plaintiffs asserted, or at all. It denies each and every allegation contained in paragraph IV of said complaint that is not herein expressly admitted.

V.

Further answering said complaint, defendant alleges:

1. That at and prior to the issuance of the policy of insurance referred to in the foregoing paragraph II hereof and as an inducement to the defendant to issue the same, the plaintiffs, and each of them, represented and warranted to this defendant:

a. That the automobile for which such insurance was desired was of the year model 1947 and had been actually manufactured that year.

b. That plaintiffs had purchased said automobile in September, 1947 and that said automobile was a new car when they had so purchased it.

c. That plaintiffs had paid the sum of Five Thousand Four Hundred Twenty Dollars ($5420.00) for such automobile.

d. That plaintiffs were the sole and unconditional owners of said automobile, had good title thereto, and were lawfully in the possession of and entitled to the use of said automobile.

2. Defendant believed such representations and warranties, and each thereof, and relied upon them and relied upon each thereof, and issued said policy of insurance induced and, believing and relying upon said representations and warranties and each thereof.

3. Each and all of said representations and warranties so made by the plaintiffs to the defendant was false, fraudulent, and untrue, and said plaintiffs, and each of them, well knew at the time said representations and warranties were by them made, as aforesaid, and at all times herein mentioned, that each and all of said representations and warranties were false and untrue.

4. Each and all of said false and fraudulent representations and warranties were made by the said plaintiffs, and by each of them with the design and purpose of deceiving and defrauding this defendant and of obtaining a contract of insurance

to which they, the said plaintiffs, were not, nor was either of them, entitled.

5. In truth and in fact at the time said representations and warranties were made and at all times herein mentioned, said automobile was not of the year model 1947 and had not actually been manufactured that year but was of the year model 1946 and had been manufactured that year, and these facts were well-known to the plaintiffs, and to each of them, at the time of their false and fraudulent representations and warranties, as aforesaid, and at all times herein mentioned.

6. In truth and in fact at the time said representations and warranties were made, said automobile had not been purchased by the plaintiffs in September, 1947 and it was not a new car when they took possession of it, but the plaintiffs had acquired the possession of said car after it had been owned, operated, driven and used by divers and sundry persons, and the plaintiffs had acquired the possession of said car from some person to defendant unknown, but who was not the owner of said automobile, and these facts were well-known to the plaintiffs and each of them, at the time of their false and fraudulent representations and warranties, as aforesaid, and at all times herein mentioned.

7. In truth and in fact, plaintiffs had not paid the sum of Five Thousand Four Hundred and Twenty Dollars ($5420.00) or any other sum for the purchase of said automobile but had acquired

the possession thereof through the payment of some sum, the exact amount being to defendant unknown, to some person then having the possession of said automobile but who was not the owner thereof, and these facts were well known to the plaintiffs and each of them, at the time of their false and fraudulent representations and warranties and at all times herein mentioned.

8. In truth and in fact, the plaintiffs were not the sole owners of said automobile or the unconditional owners of said automobile and they did not have good or any title thereto, and they were not, nor was either of them, lawfully in the possession of said automobile or entitled to the use thereof and these facts were well known to the plaintiffs at the time of their said false and fraudulent representations and warranties and at all times herein mentioned.

VI.

Further answering said complaint defendant alleges that the plaintiffs, and each of them, knows and has known at all times in their said complaint mentioned where said automobile is located and in whose possession the same is and that the person presently having the possession of said automobile is lawfully entitled to the same and has been so lawfully entitled to the possession of said automobile during all times that he has held the same.

VII.

Further answering said complaint, defendant alleges that when said policy of insurance was so

applied for by the plaintiffs and issued by the defendant, as aforesaid, there was a chattel mortgage lien upon said motor vehicle, in favor of the Exchange National Bank, Chicago, Illinois, and this fact was by the plaintiffs willfully concealed and withheld from the knowledge of the defendant.

VIII.

Further answering said complaint, defendant alleges that when said policy of insurance was so applied for by plaintiffs and issued by the defendant, as aforesaid, plaintiffs well knew (a) that they had acquired the possession of said car within the State of Illinois, (b) that said car was then registered within the State of Illinois, (c) that the plaintiffs, in violation of the provisions of Section 66-205(c) of the Arizona Code of 1939, did not surrender to the Motor Vehicle Division of the Arizona Highway Department the number plates assigned to such vehicle in Illinois, nor did they surrender the Illinois registration card or the Illinois certificate of title, nor did they furnish any evidence of ownership or right to possession in the plaintiffs, but on the contrary the said plaintiffs did remove certain Arizona license number plates from another motor vehicle and place the same upon the automobile described in the policy of insurance here sued upon, and did operate and drive said automobile, within the State of Arizona, in violation of the laws of the State of Arizona, with said license number plates affixed thereto that had been by

plaintiffs removed from such other motor vehicle; and the plaintiffs willfully concealed each and all of such facts from the defendant.

Wherefore, defendant demands judgment, that plaintiffs take nothing, and that the defendant recover its costs.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for Defendant,

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed Feb. 8, 1949.

In the United States District Court for the District of Arizona

Honorable Dave W. Ling, United States District judge, presiding.

[Title of Cause.]

MINUTE ENTRY OF MONDAY, FEBRUARY 10, 1949

Allan K. Perry, Esq., appears as counsel for the defendant and further pretrial conference is had as follows:

Defendant's Exhibit 1, Depositions of Dr. Louis P. Lutfy and Bertha A. Lutfy, is now admitted in evidence.

Defendant's Exhibit 2, Photostatic copy of record of Secretary of State of State of Illinois, (8 documents), is now admitted in evidence.

Defendant's Exhibit 3, Photostatic copy of record of Motor Vehicle Commissioner of State of Florida (6 documents), is now admitted in evidence.

It Is Ordered that the record show this case is submitted and taken under advisement.

PLAINTIFF'S EXHIBIT A

Standard Automobile Policy
Stock Company

Expires September 19, 1948 at 12:01 A.M. (Standard Time).
Automobile Lincoln No. H 150200
Amount, $ ACV
Premium, $159.00
Insured Dr. Louis P. Lutfy and Bertha A. Lutfy
No. 148323

The London Assurance
A.D. 1720
Third Century of Active Business

Pacific Coast Branch
369 Pine Street, San Francisco

James C. Hitt, Manager
Chas. G. Landresse, Manager Automobile Department

Bailey & Wamsley, General Agents
406 Goodrich Bldg. Phoenix, Arizona

Issued thru Al Lindsey Agency
206 W. Adams St. Phoenix, Ariz.
Bus. Ph. 4-2561 Res. Ph. 4-7841

Please Read Your Policy

10-43-K

Plaintiff's Exhibit A—(Continued)

The London Assurance

Standard Automobile Policy

No. 148323

(A stock insurance company, herein called the company)

Declarations

Item 1.

Name of Insured Dr. Louis P. Lutfy and Bertha A. Lutfy

Address 301 West McDowell Road, Phoenix, Arizona

Garage: The automobile will be principally garaged in the above town or city, county and state, unless otherwise stated herein: No exceptions

Occupation of the insured is Physician

Name and address of employer ——

Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as herein stated: No exceptions

Loss Payee: Any loss hereunder is payable as interest may appear to the insured and Insured Only.

Item 2.

Policy Period: From September 19, 1947 to September 19, 1948 12:01 A.M., standard time at the address of the insured as stated herein.

Item 3.

In consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, the company agrees to pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, sustained during the policy period, with respect to such and so many of the following coverages as are indicated by specific premium charge or charges:

A—Comprehensive—Loss of or damage to the Automobile, Except by Collision but including Fire, Theft and Windstorm. Actual Cash Value. Premium $53.00

B-1—Collision or Upset. Actual Cash Value less $50.00, which deductible amount shall be applicable to each Collision or Upset. Premium $106.00

Plaintiff's Exhibit A—(Continued)

B-2—Convertible Collision or Upset—nil

C—Fire, Lightning and Transportation—nil

D—Theft (Broad Form)—nil

E—Combined Additional Coverage—nil

Total Premium $159.00.

Item 4.

Description of the automobile and facts respecting its purchase by the insured:

Year of Model 1947

Trade Name Lincoln

Body Type Continental Conv. Coupe

Serial Number H-150200; Motor Number same

Number of Cylinders 12

Actual Cost When Purchased Including Equipment $5420.00

Purchased Month 9, Year 1947, New, Encumbrance None.

Item 5.

The purposes for which the automobile is to be used are Business and Pleasure.

Item 6.

Territory, Purposes of Use: This policy applies only while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between parts thereof, and is owned, maintained and used for the purposes stated as applicable hereto.

Countersigned: September 19, 1947, at Phoenix, Arizona. Al Lindsey Agency, By Al Lindsey, Agent.

(Space for Attachment of Endorsements)

Insuring Agreements

(Subject to the limits of liability, exclusions, conditions and other items of the policy.)

Insurance Coverages Defined

Coverage A—Comprehensive—Loss of or Damage to the Automobile, Except by Collision

Any loss of or damage to the automobile except loss caused by

Plaintiff's Exhibit A—(Continued)

collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage B-1—Collision or Upset

Loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile.

Coverage B-2—Convertible Collision or Upset

Loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile. Upon the occurrence of the first loss for which payment is sought hereunder the insured shall pay to the company the additional payment stated in the declarations. Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.

Coverage C—Fire, Lightning and Transportation

Loss of or damage to the automobile caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.

Coverage D—Theft (Broad Form)

Loss of or damage to the automobile caused by theft, larceny, robbery or pilferage.

Coverage E—Combined Additional Coverage

Loss of or damage to the automobile caused by windstorm, earthquake, explosion, hail, external discharge or leakage of water, flood or rising waters, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment.

Special Provisions

Loss of Use by Theft—Rental Reimbursement

The company, following a theft covered under this policy, shall

Plaintiff's Exhibit A—(Continued)

reimburse the insured for expense not exceeding $5 for any one day nor totaling more than $150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs.

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the insured or the company or on such earlier date as the company makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

General Average and Salvage Charges

The company, with respect to such transportation insurance as is afforded by this policy, shall pay any general average and salvage charges for which the insured becomes legally liable.

Automatic Insurance for Newly Acquired Automobiles

If the insured who is the owner of the automobile acquires ownership of another automobile and so notifies the company within thirty days following the date of its delivery to him, such insurance as is afforded by this policy applies also to such other automobile as of such delivery date:

(a) if it replaces an automobile described in this policy, but only to the extent the insurance is applicable to the replaced automobile, or

(b) if it is an additional automobile and if the company insures all automobiles owned by the insured at such delivery date, but only to the extent the insurance is applicable to all such previously owned automobiles;

provided, when a limit of liability is expressed in the declarations as actual cash value, such limit shall apply to such other automobile, and when a limit of liability is so expressed as a stated amount, such limit shall be replaced by the actual cash value of such other automobile, but any deductible amount so expressed shall apply in either case.

Plaintiff's Exhibit A—(Continued)

This automatic insurance does not apply: (a) to any loss against which the insured has other valid and collectible insurance, or (b) except during the policy period, but if such delivery date is prior to the effective date of this policy, the insurance applies as of such effective date, or (c) to automobiles owned and held for sale by automobile dealers.

The insured shall pay any additional premium required because of the application of the insurance to such other automobile. The insurance terminates upon the replaced automobile on such delivery date.

Expense Reimbursement

As respects such insurance afforded by the other terms of this policy the company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

Exclusions

This policy does not apply:

(a) under any of the coverages, while the automobile is used as a public or livery conveyance unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;

(c) under any of the coverages, to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority;

(d) under any of the coverages, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

(e) under any of the coverages, to robes, wearing apparel or personal effects;

(f) under any of the coverages, to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

Plaintiff's Exhibit A—(Continued)

(g) under coverages A and D, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance;

(h) under coverages B-1 and B-2, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(i) under coverages B-1, B-2, C and D, to loss due to riot or civil commotion.

(j) under any of the coverages while the automobile is used in any illicit trade or transportation.

Conditions

1. Insured's Duties When Loss Occurs

When loss occurs, the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request;

(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the insured setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the company's request, the insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permit-

Plaintiff's Exhibit A—(Continued)

ting copies thereof to be made, all at such reasonable times and places as the company shall designate.

2. Appraisal

If the insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

3. Limit of Liability; Settlement Options; No Abandonment

The limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is a part thereof the actual cash value of such part, at time of loss nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.

The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company.

4. Automatic Reinstatement

When the automobile is damaged, whether or not such damage is covered under this policy, the liability of the company shall be

Plaintiff's Exhibit A—(Continued)

reduced by the amount of such damage until repairs have been completed, but shall then attach as originally written without additional premium.

5. Payment for Loss; Action Against Company

Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

No suit or action on this policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the foregoing requirements nor unless commenced within twelve (12) months next after the happening of the loss; provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.

6. Other Insurance

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. No Benefit to Bailee

The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

8. Assistance and Cooperation of the Insured

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense.

Plaintiff's Exhibit A—(Continued)

9. Subrogation

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

10. Automobile Defined; Trailers; Two or More Automobiles

Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semitrailer described in this policy. The word "automobile" shall also include its equipment and other equipment permanently attached thereto. The word "trailer" shall include semitrailer.

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each and a motor vehicle and a trailer or trailers attached thereto shall be held to be separate automobiles as respects limits of liability, including any deductible provisions.

11. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

12. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover the insured's legal representative as the insured.

Plaintiff's Exhibit A—(Continued)

13. Cancelation

This policy may be canceled by the insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing.

If the insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

14. Fraud and Misrepresentation

This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

15. Terms of Policy Conformed to Statute

Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

16. Declarations

By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, the company has caused this policy to be

Plaintiff's Exhibit A—(Continued)

executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company.

Al Lindsey Agency
James Hitt,
Manager and attorney-in-fact.

September 19, 47, Phoenix, Arizona.

Admitted and Filed Feb. 7, 1949.

Receipt for Cancelation attached (not filled out).

DEFENDANT'S EXHIBIT No. 1

In the District Court of the United States for the District of Arizona.

No. Civ. 1173-Phx.

LOUIS P. LUTFY, et ux,

Plaintiff,

vs.

THE LONDON ASSURANCE, a corporation,

Defendant.

Deposition of Dr. Louis P. Lutfy

The depositions of the plaintiffs, Dr. Louis P. Lutfy and Bertha A. Lutfy, husband and wife, were taken pursuant to notice on file in the above entitled court, commencing at the hour of 10:30 o'clock A.M. on the 11th day of December, 1948, at 309 First National Bank Building, Phoenix, Arizona.

It was further stipulated that said depositions be signed by the deponents on the last page thereof, certifying as to the correctness of their testimony.

Defendant's Exhibit No. 1—(Continued)

The plaintiffs were present and represented by Mr. James Struckmeyer, of Messrs. Struckmeyer & Struckmeyer.

The defendant was represented by its attorney, Mr. Allan K. Perry, of Messrs. Kramer, Morrison, Roche & Perry.

The following proceedings were had:

DR. LOUIS P. LUTFY

was called as a witness by the defendant for cross-examination under the Statute, and being first duly sworn, testified as follows:

Cross-Examination

By Mr. Perry:

Q. Your name is Louis P. Lutfy?

A. Yes, sir.

Q. You are a physician and surgeon here in Phoenix? A. Yes.

Q. Where do you live, Dr. Lutfy?

A. I live at 714 West Maryland Avenue.

Q. Phoenix? A. Yes, sir.

Q. You are one of the plaintiffs in this suit?

A. Yes, sir.

Q. And with respect to the insurance policy that you are bringing this suit on, did you order that from the Company or did Mrs. Lutfy?

A. No, I ordered that.

Q. From what agent did you order it?

A. From Al Lindsey.

Defendant's Exhibit No. 1—(Continued)

(Deposition of Dr. Louis P. Lutfy.)

Q. Was that by a written order or by conversation? A. No, it was over the telephone.

Q. Was that on or about the day that the policy was issued, do you recall?

A. Let's see the policy.

(The policy was handed to the witness by Mr. Struckmeyer.)

A. I ordered the insurance on September 19th, 1947, and the policy is dated the same date, but I did not receive it until one or two weeks later.

Q. (By Mr. Perry): And what information did you give Al Lindsey with respect to the policy when you ordered it?

A. I gave him the year number, the motor and serial number, and the cost.

Q. What year model did you tell him it was?

A. '47.

Q. Did you later find out it was a '46?

A. No, I am not sure whether it is a '46 or not, but I am still under the impression that it is a '47 automobile, because that is the number that is on the certificate of title.

Q. In any event, you told him it was a '47 model?

A. Yes.

Q. And did you tell him when you had bought it? A. Yes.

Q. And what did you tell him with respect to that? A. It was September 19th, 1947.

Defendant's Exhibit No. 1—(Continued)

(Deposition of Dr. Louis P. Lutfy.)

Q. And did you tell him whether it was new or used when you bought it?

A. Yes, I told him it was new.

Q. And did you tell him how much you had paid for it? A. Yes, the cost was $5420.

Q. $5420? A. That is right.

Q. That is what you told Lindsey when you bought it? A. Yes.

Q. Was there anything said about whether or not there were any liens on it or whether it was your sole property?

A. Nothing was said about that, but I told him it was my sole property.

Q. That is, yours and Mrs. Lutfy?

A. Yes.

Q. And you said something about the certificate of title a minute ago. What certificate of title did you refer to?

A. That is the certificate of title that my wife received when she bought the automobile.

Q. Do you have that, Doctor?

A. No, I don't.

Q. Where is it, do you know?

A. She gave it to a man by the name of Marciano.

Mr. Struckmeyer: Pardon me for interrupting. Dr. Lutfy, you only testify as to those things which you know of your own knowledge. You can't say

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

what Mrs. Lutfy did unless you know personally that she did it.

A. I can't answer that question?

Mr. Struckmeyer: That is right.

Mr. Perry: That Marciano that you speak of is M-a-r-c-i-a-n-o? Is that right?

A. Well, he says I can't answer that question.

Q. All right, okay. You don't know Marciano at all, do you? A. No.

Q. Did you ever see that certificate of title with respect to this particular automobile? A. No.

Q. You never had an Arizona certificate of title for it? A. No.

Q. Or a certificate of title from any other state issued to you? A. No.

Q. Now, you said a few minutes ago that you didn't know whether the car was a '46 or '47, is that true? A. As far as I know, it is a '47.

Q. And what do you base that statement on, Doctor?

A. That information is the information that I obtained from my wife when she called me and she got that off from the title.

Q. You made no inquiry to ascertain if the motor number or serial number indicated a '46 or '47 car?

A. I checked the motor over with Mr. Stephens of the Stephens—of the Lincoln-Mercury at Phoenix, and he says there is only one model Conti-

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

nental, a few of them were made in '46 and a few were made in '47, and a few were made in '48, and that that they are all exactly identical, the only difference is that between certain numbers they designate a certain car as a '46 and between other numbers '47, and between other numbers it was a '48. Most of those cars were made in '47. There were few '46's and a very few '48's.

Q. When did you see this particular car, Doctor?

A. I saw this particular car on—when did you——

Mrs. Lutfy: Oh——

Mr. Struckmeyer: Now, wait a minute, Mrs. Lutfy, you can't tell him anything either.

Mr. Perry: About when, as nearly as you can recall?

A. Well, it took her about five or six days to make the trip from Chicago to Phoenix.

Q. Probably it would be somewhere around the 25th of September, 1947?

A. That is right, yes.

Q. Now, at the time you ordered the insurance policy the car was not in Arizona, was it, so far as you know? A. No, it was not.

Q. And in order to conserve your time and ours too, would you just give us, in your own words, the history of the transaction whereby you acquired this car. That may not be a proper question, but if you don't object to it——

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

Mr. Struckmeyer: I'd prefer Mrs. Lutfy answering that.

Mr. Perry: Well, I mean as far as the Doctor knows.

Mr. Struckmeyer: As far as he knows personally, yes, that is all right.

Mr. Perry: Yes.

A. Well——

Mr. Perry: What I mean by that, Doctor, is just what you had to do with it.

A. Yes. I was contacted at various times by a used car dealer from whom I previously purchased a Ford car, who were doing business in Phoenix under the name of Chadwick and Walden, and they stated they would be able to obtain an automobile for me, a very new Lincoln Continental off the showroom floors in Chicago, for $5900, and first we wanted to make arrangements to have the car shipped by railway and purchase it here, but due to the cost of shipping it, it was decided that I'd buy the car here through them, giving them a check, making the check payable to Consolidated Motors in Tucson, and the check would be postdated about three or four days after the date that the car was bought on so that my wife could go over and view it and see if it was actually a new automobile and whether it was actually in good condition, and if it was, she would telephone me and then they could

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

cash the check and she could take delivery of the car.

Mr. Perry: Let me interrupt you just a minute there. This Chadwick——

A. Chadwick and Walden.

Q. Will you spell those names?

A. C-h-a-d-w-i-c-k and W-a-l-d-e-n.

Q. They were used car dealers at Phoenix, were they? A. Yes.

Q. Well, then, I don't quite understand, what was the Consolidated Motors in Tucson, what was their connection with it?

A. All right. Well, all right. This is the way it worked: Chadwick and Walden was informed by Consolidated Motors in Tucson that they knew where an automobile could be purchased, and the Consolidated Motors in Tucson got their information from a firm in El Paso, and each one of these people were going to receive a commission on the deal.

Q. Well, was that H. J. Chadwick, do you know?

A. I don't know.

Q. Well, all right. Do you know if Walden's name is Bert Walden? A. Yes.

Q. Which one did you deal with, Doctor?

A. Most of the business was done with Mr. Walden. However, they both came out to the house that evening and received the check.

Q. Both of them came out to your house?

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

A. Yes.

Q. And about when was that?

A. That was September 17th or 18th.

Q. And you gave them a check for how much money? A. $5900.

Q. And that was payable to the Consolidated Motors at Tucson? A. That is right.

Q. Then go ahead and tell what happened.

A. Okay. When she got back there—no, she called me and stated that she had arrived there and that she had contacted Mr. Marciano—they gave us the name and the telephone number of the man she was supposed to contact, and he was going to take her down to the Chicago Sales Corporation, which was the Lincoln-Mercury dealer in Chicago, to see the automobiles. Well, she called in the afternoon before and stated she was going the next morning to see the automobiles and after talking to Mr. Marciano, he suggested—he asked her what she was going to pay for the car, and she said $5900. He said, "Well, I am only giving 56—$5400 for it." He said, "They are making $500 on you." He says, "I will just as soon get it for you direct." He said, "However, I have done business with them before, and the best thing for you to do is just telephone your husband and tell them that you are going to buy the car someplace else and in that way I will get it for you direct," so that is what we did.

Q. Mrs. Lutfy then telephoned you?

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

A. Telephoned me and said she was going out to see the cars the next day, but that the price he was selling it for was $5400, and that they were going to make $500 commission on the deal.

Q. You didn't go back to Chicago on the deal at all, did you?

A. No. So then I sent her a Postal money order for the amount of $5400.

Q. Was that a Postal money order or a Western Union?

A. That was a Western Union money order dated September 18th, 1947, in the amount of $5600.

Q. And that was payable to Mrs. Lutfy?

A. Mrs. Tiny Lutfy, that is right.

Q. You wired that on the 18th?

A. I wired that on the evening of the 18th and she received it on the 19th.

Q. Then did you hear any more from Mrs. Lutfy concerning the purchase of this car?

A. Yes. She called me up and gave me—she called me up the next day and said she had bought the automobile and she gave me the motor number and serial number, and I called up Mr. Lindsey and had the car covered with insurance.

Q. Then did anything further transpire that you know of between that time and the time Mrs. Lutfy brought the car to Phoenix?

A. No. We covered it with insurance and she

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

drove it, and it took her about five or six days to get to Phoenix.

Q. Then I think you told us it was probably around the 25th, somewhere, of September, when she brought the car here? A. That is right.

Q. Did you examine it at that time?

A. Yes.

Q. And were you able to tell from your examination whether it was a new or used car?

A. Well, it looked like a new automobile to me. There was no mileage on it except the mileage that she had used in driving it out here, and I got in it and examined it, and as far as I could tell, it was a new car.

Q. Did you have anybody else make an examination of it for you?

A. No, I didn't. Mr. Chadwick, he looked it up in his little book, he looked up the number in his little book, and he said that particular number was at the tail end of the '46's

Q. Now, what, if anything, did you do toward getting a certificate of title for it?

A. Well, I wrote to Mr. Marciano and told him I had not yet received the certificate of title, I was waiting for it, and he stated he had just gotten it back from Springfield and wanted to know if the paper should be in my name or Mrs. Lutfy's name, or in both names, that it could not be issued in my

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)
name, and I told him to go ahead and issue it, and he was sending the title.

Q. When was that that you wrote to him?

A. October 11th, 1947.

Q. Do you have a copy of the letter, Doctor?

A. Copy of the letter was addressed to the Motor Vehicle Department, Springfield, Illinois.

"Dear Sirs: Please register Lincoln convertible cabriolet, Serial and Motor No. H-150,200 in the name of Louis P. Lutfy," and I mailed that to Mr. Marciano at 7925 South Trimble Avenue, Chicago, Illinois, and he was going to send it on in to the Motor Vehicle Department and have it transferred into my name.

Q. Then you received an answer from him, did you?

A. Well, a part of this was contacted over the telephone and a part of it was by mail.

Q. Well, did you get a written answer from Marciano?

A. No, I didn't get a written answer to this.

Q. Did he call you?

A. I talked to him on the telephone later, and he said he was taking care of it, and I would receive it.

Q. And that would be some time after October 11th? A. Yes.

Q. I see. He never did send you the certificate of title?

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

A. No, I never did receive the certificate of title.

Q. Did you ever make any application to the Arizona Motor Vehicle Department for a certificate of title?

A. No, because I would have to have this Illinois title before I could do that.

Q. Now, this car was stolen from you, was it?

A. Yes.

Q. When was that, Doctor?

A. It was stolen from me about—it was on Tuesday, October 28th. I returned to the office about two o'clock and parked the car right at the side of my building.

Q. Where is that?

A. At 301 West McDowell Road, and about 5:15, upon closing the office, I was going out the back door to get into the automobile, and I noticed it had disappeared.

Q. You had the keys to it, did you?

A. Yes, I had the keys in my pocket.

Q. And what, if anything, did you learn about who had taken the car or how it had disappeared, Doctor?

A. Well, when I came, I had a doctor occupying the back rooms of my office, and when I came back looking bewildered he says, "Oh, I saw somebody get in your car and drive off, and I was coming back to tell you about it, but the phone rang, and I went and answered the phone, and then I

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

forgot about it, I gave it no more thought because I thought you were having a mechanic take the car to have it repaired."

Q. What doctor was that?

A. Dr. Reichert.

Q. Have you ever seen the car from that date to this? A. No.

Q. Have you learned where the car is, or in whose possession it is? A. Only through——

Mr. Struckmeyer: The record may show that I am instructing Dr. Lutfy to answer only those things which he knows of his personal knowledge.

Mr. Perry: Well, I asked him if he had learned.

Mr. Struckmeyer: Yes.

A. I have learned indirectly.

Q. And from whom did you acquire that information?

A. From the Federal Bureau of Investigation.

Q. Were you told by the Federal Bureau of Investigation who had the car and where it was?

A. Yes.

Q. And what did they tell you?

A. They stated that the car was sold in Miami, Florida at an auction to a man by the name of G. Horbath, 368 Northeast 52d Street, Miami, Florida.

Q. Have you made any effort to repossess the car from that man? A. No.

Q. Why was that?

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

A. Because it was up to the Insurance Company to repossess it.

Q. You have not tried to get it back at all?

A. No, I furnished them with all the information on the car and everything, and gave it to their representative, and asked them to——

Q. (By Mr. Perry): Were you also informed by the Federal Bureau of Investigation that a certificate of title had been issued to this man Horbath?

A. No, I was not.

Q. Now, did you apply for a warrant of arrest for anyone in connection with the theft of this car?

A. Yes.

Q. Just tell us about that, if you will.

A. Dr. Reichert and my wife and myself went down to the courthouse and signed a John Doe warrant for the arrest of the thief who stole the automobile, giving a description.

Q. And that description was obtained from Dr. Reichert, was it? A. That is right.

Q. I see. A. You want the date of that?

Q. Yes, if you have it.

A. That was on December 5th.

Q. '47?

A. '47, yes. Bob Renaud, the County Attorney.

Q. And do you know if the thief was ever apprehended? A. No, I don't know.

Q. Now, you had given the Consolidated Motors a check for $5900? A. Yes.

Defendant's Exhibit No. 1—(Continued)
(Deposition of Dr. Louis P. Lutfy.)

Q. And you had also sent your wife $5400?

A. 5600.

Q. $5600? A. Yes.

Q. Did you get back the $5900?

A. No, I got back part of it.

Q. I see.

A. I paid them their commission of $500 and got back the remainder.

Q. That is Walden and Chadwick?

A. Yes.

Q. Did you have a lawsuit with them about that?

A. No, I didn't, but we threatened to sue them for the return of the money.

Q. You didn't actually file any suit?

A. We attached their bank accounts but we never did file suit.

Q. Who represented you in that matter?

A. My brother, William P. Lutfy.

Q. Then you attached their bank accounts for the $5900? A. Yes.

Q. And then some settlement was made whereby you got back 5400?

A. Yes, we paid them the commission they wanted and got back the remaining money.

Q. It was $500 and something like that?

A. Between four and five hundred dollars commission that we paid them.

Q. Did you have any other litigation over the purchase of this car? A. No, I don't think so.

Q. So this one suit, not necessarily a suit, but

Defendant's Exhibit No. 1—(Continued)

(Deposition of Dr. Louis P. Lutfy.)

this attachment of the money of Walden and Chadwick's, and that is the only litigation you have ever had? A. Yes.

Q. And where was that done, right here in Phoenix? A. Here in Phoenix, yes.

Q. And then they did pay you the 5500, whatever it amounted to?

A. Yes. They stated that due to the fact they had made a contact for us and they had spent a considerable amount of money in telephone calls and everything that they were entitled to that commission, so we paid it and received back the balance of about $5400 minus the cost of garnishments, and so forth.

Q. And you, yourself, as distinguished from Mrs. Lutfy, had nothing to do with the transaction back there in Chicago other than what phone calls you had back and forth to her and the wiring of this $5600? A. That is right.

Q. Did you at any time learn that prior to the time you got this car it had been in a wreck?

A. No, I never did know that.

Mr. Perry: I think that is all for Dr. Lutfy.

(The witness was excused.)

I hereby certify that I have read the foregoing 20 typewritten pages, and changes, if any, were made by me and initialed in ink, and the same is now a true and correct transcript of my testimony.

/s/ LOUIS P. LUTFY.

Defendant's Exhibit No. 1—(Continued)

BERTHA A. LUTFY

was called as a witness by the defendant for cross-examination under the Statute, and being first duly sworn, testified as follows:

Cross-Examination

By Mr. Perry:

Q. Now, will you state your name, please?

A. Bertha A. Lutfy.

Q. You are the wife of Dr. Lutfy who just testified here? A. Yes.

Q. And one of the plaintiffs in this case?

A. Yes.

Q. You, Mrs. Lutfy, had nothing to do, I understand, with the ordering of this policy of insurance in which this suit is about? A. No.

Q. And will you just tell us all that you can now with respect to the purchase of this particular car? Just give me a history of it if you can.

A. Well, on the morning of about the 17th we received this call from Chadwick and Walden concerning this particular car. Now, I might say that previous to this, over a period of months, they had contacted us on several different Continentals that were being driven through Phoenix, but we didn't want them because they weren't new cars. When they called us early in the morning they said it was a new car in Chicago, and it was on the display floor at the Chicago Motor Sales Company.

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

Q. Let me interrupt you right there. Did you take that telephone call, or did the Doctor?

A. We were in bed. He took the call.

Q. I see. Go right ahead.

A. Then my husband said—well, the conversation went on, and the only way we could get the car was for one of us to go back there and drive it out, so my husband said, "All right." I got a plane ticket that afternoon to fly back that evening. Chadwick and Walden came out to the house around 6:30, arrangements were made, a check was given to them made out to the Consolidated Motors in Tucson, a postdated check. Chadwick & Walden told me that I would not have to do a thing but get off that plane, call this Republic, I think it was 10567, and Mr. Marciano, and he would take me to the car. They said the car would be in our name, as a matter of fact. They said it was in our name then when they came out to the house, and it was at the Chicago Motor Sales Company; to get into the car, there was nothing to it but drive off then. When I arrived in Chicago, I called—I called Marciano. He wasn't home, and his wife told me to come out to their place, so I got a cab and went out to their home, and I waited for him, and after five o'clock he came in, and he confirmed that the car was there but it was not in our name, so then I tried to—oh, during the course of the evening, why, he asked me what I was paying for the car and I told him $5900,

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

and then he told me, why, he could get the car for $5420, so I said, "All right." Well, Chadwick and Walden told us before I left, they said, "We aren't making a thing on this car. You have been a client of ours, you bought a car from us and——" what did he say? Oh, he said that the difference in the price of the automobile, the new price, and the 5900, it was tax, a new Chicago tax, and all of that stuff.

Q. Who told you that?

A. Walden and Chadwick did at our home.

Q. Both of them?

A. Yes. They said, "We aren't making a thing on this"—well, I made the deal then with Marciano. I went the next morning to see the car, and it was a black convertible Continental, and it was at the Chicago Motor Sales Company; it was not on the display window, and I asked why it was not. Marciano said, "Well, you were supposed to have come in on a plane early this morning"—and I didn't get in until noon—and they said they thought you weren't coming in. It had white side wall tires on it, and somebody else that was buying a new car there wanted the white side walls on it so they took them off. Well, I went upstairs at the Lincoln Agency there, I think it was the third floor, and there was the car, they were putting the black tires on, so that was the difference from the check, you know, 5600, and then it was cut down to 5420 was the price making an allowance for the tires. I

Defendant's Exhibit No. 1—(Continued)

(Deposition of Bertha A. Lutfy.)

looked the car over and it looked new to me, no mileage on it, and there was another brand new Continental in there with no plates that was being taken out for delivery then, and I looked at it and had them put the hood up on it, and I looked inside, looked at the one I was getting, and they both looked alike to me, one was as clean as the other, so I had the check, and we were to go to the bank. He said, "We will have to go to the bank," so I went with Marciano to the bank and we were going to meet a representative of the Lincoln Agency there, and at the bank I met this Mr. Jordan and we were in there, I would say, about 20 minutes, and then one of the bank officials who was with Mr. Jordan, and then he came over there without Mr. Jordan, this bank official and myself, and then I endorsed the check, identified myself, and he endorsed the check, gave it to Mr. Jordan, he cashed it and he gave me back the change from the $5420. He handed me the title to the car. On the title it was '47, so I left the bank——

Q. Let me interrupt you right there. Whose name was the title in?

A. The title was in Donald Jordan's name. So I asked Marciano, I asked him why it was in the name of Donald Jordan, I was talking to him. He said, "Well, they did that because there are so many people—people that want Continentals that has been on the floor down there, you know, for a month or

Defendant's Exhibit No. 1—(Continued)

(Deposition of Bertha A. Lutfy.)

so, and so many people before them, and they put it in somebody's names and they say the car is sold, so in that way there wouldn't be any trouble by somebody coming in from out of town to buy the car." Well, that sounded satisfactory——

Q. Was anything said at this time about this man Jordan having a lien on the car?

A. Well, I didn't know—I didn't know what was going on. I was standing there in the bank by one of those pillars, you know, and I had been waiting for Mr. Jordan. I met him and he went over some place to one of the offices there, you know, with a little fence in the bank, and was talking with them, and I didn't know. The man came over with the banker and I identified myself and made the deal there.

Q. That was the Corn Exchange National Bank?

A. No, was it Corn—no, no, no—wait a minute, I will think in just a minute the bank. It was this Exchange National Bank.

Q. The Exchange National Bank?

A. Yes.

Q. And was anything said at that time or any place else while you were talking there that this bank had a mortgage on the car? A. No.

Q. Where is this bank, Mrs. Lutfy?

A. Well, I am not too familiar with Chicago, but it was on—you know the address there, don't you, Jimmie, that the Exchange National Bank is?

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

Mr. Struckmeyer: That is what I was looking for.

A. Was it on State Street? It was a new modern bank with a drive-in place there.

Q. (By Mr. Perry): Well, it doesn't make any particular difference, I just wondered if you knew. In any event, you had a check from the Western Union payable to you? A. Yes, sir.

Q. For $5600? A. Yes, sir.

Q. And you endorsed the check? A. Yes.

Q. And gave it to who?

A. To Mr. Jordan, who, in turn, endorsed it and cashed it.

Q. Do you recall the name of the bank official that was there at the time?

A. No, but there is on this check, he did put his endorsement on it after I identified myself. It is on here. I have a photostatic copy. There is the endorsement here and one here. I don't know which one, other than the initial "RCL" and "RBH". Doesn't it look like that?

Q. Would you recall his name?

A. Oh, no, no.

Q. The name Schussler—S-c-h-u-s-s-l-e-r doesn't mean anything?

A. No. The endorsement is on here.

Q. Now, when I interrupted you, you started to say something about then when you left the bank.

A. I left the bank. I had title and then I went

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

and called my husband to have it covered by insurance. Then I wanted—I asked Marciano, "Now, what do I do—where do I go to get this title put into my name?" So he said, "Well," he said, "You let me take care of that," and as long as—I told him I was going to River Forest to see some friends for a couple of days, and he said, "I will take care of that in the morning and airmail the title out to Phoenix and it will be there before you arrive in Phoenix."

Q. At that time you had the certificate of title?

A. I had the certificate of title and I had put "Dr. and Mrs. Louis P. Lutfy" on it. I had signed it.

Q. Was it an Illinois certificate of title?

A. Yes.

Q. Issued to this Donald Jordan?

A. Donald Jordan.

Q. And then you signed for your husband and yourself on the place for the purchaser to sign?

A. Yes.

Q. And then gave it to Marciano? A. Yes.

Q. All right. And he told you that he would get it transferred and send it to you at Phoenix?

A. That is right.

Q. Then what happened, Mrs. Lutfy?

A. Well, then, I went to River Forest and was there a day or two, and then drove to Phoenix.

Defendant's Exhibit No. 1—(Continued)

(Deposition of Bertha A. Lutfy.)

Q. You made no application to obtain an Arizona certificate of title? A. No, sir.

Q. And you and your husband both drove the car, did you, until it was stolen?

A. Well, my husband drove it most of the time because I had my own.

Q. You drove it all the way out here?

A. Yes, sir.

Q. Did it have an Illinois license still on it when you had it?

A. No, it didn't. Chadwick and Walden told me to take Arizona plates back there.

Q. How did you get the Arizona plates for it?

A. Well, I just took some Arizona plates.

Q. Some that you had had on another car?

A. Yes, off the Buick.

Q. That was the Buick that you folks had owned here? A. That is right.

Q. And you took the plates off of them?

A. That is right.

Q. Took them back to put on this car there?

A. Yes.

Q. And drove it out with the Arizona plates on it?

A. Yes, sir. Mr. Marciano put them on for me.

Q. Now, how many times did you meet this man Jordan? A. Once.

Q. And that was in the Exchange National Bank? A. That is right.

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

Q. And there was Marciano and you and Jordan and some official or some employee of the bank there at that time? A. That is right.

Q. And you were all there together; I mean you would have heard anything that the rest of them said? I mean all four of you were right there together, Jordan and the bank officer and Marciano and yourself?

A. Yes. Marciano was sitting a little to the side, and when I saw the title was in Jordan's name, I stepped over and talked to him about that and he told me the story that I have previously told.

Q. Did Jordan sign the certificate of title and the endorsement on it to you and the Doctor right there in your presence? A. Yes.

Q. I believe you already told us then when he did that you signed Dr. Lutfy's name and your name where the purchasers should sign?

A. That is right.

Q. Up until that time had you driven the car?

A. No.

Q. It was where, at the Chicago——

A. Chicago Motor Sales, Lincoln-Mercury.

Q. Do you know where that is?

A. That is on Michigan, South Michigan Avenue.

Q. It doesn't make any difference, I just wondered if you knew.

A. It is one of the main Lincoln agencies there.

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

Q. Then when you left the bank you had already given Marciano the title certificate back, is that right?

A. No, not in the bank, I didn't give it to him, no.

Q. Where did you give it to him, Mrs. Lutfy?

A. I gave it to him after I picked the car up. I had the car, and when I was getting ready to leave him. That was, I don't know exactly where it was, in Chicago. I am not familiar with the city.

Q. Do you know whether it was at the Chicago Motor Sales Company? A. No.

Q. Then after you left the bank you went and got the car, is that right?

A. I went and got the car.

Q. Was Marciano or Jordan with you then?

A. Marciano.

Q. You saw Jordan no more after he got his money? A. No.

Q. Then Marciano went back with you to this Chicago Motor Sales to get the car, is that right?

A. Yes.

Q. And then some time after that you gave him the certificate of title back?

A. Yes—you see, I saw Jordan no more after I left the bank.

Q. Yes.

A. Well, Mr. Marciano had the car that he was driving me around in and we all left the bank to-

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

gether and Mr. Marciano left Jordan off a few blocks, three or four blocks down in the Loop somewhere, some office.

Q. You and Marciano went on back to the Chicago Motor Sales? A. That is right.

Q. You got the car? A. That is right.

Q. What I am trying to get at is, when was it with reference to that that you gave Marciano back the title certificate.

A. It was after I got the car.

Q. And you don't know where?

A. It was in Chicago. I will tell you—it was in front of the Du Pont Company, Du Pont de Nemours, one of their offices that I gave him the title. That is one thing that I remember.

Q. You had the car at that time?

A. Yes, it was parked right in front.

Q. How did you happen to meet Marciano there?

A. Chadwick and Walden had given me one of their cards. It was a card with A. Marciano on it and his telephone number, Republic 10567.

Q. He never did give you the title after that?

A. After I gave it to him? No.

Q. You never saw it any more? A. No.

Q. And these Buick plates, were they used on it at all times after Marciano put them on up until the car was stolen?

A. I don't remember that.

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

Q. You don't remember whether you put any other——

A. We didn't put any other plates on it, no. I don't remember.

Q. And do you know why you didn't ask or apply for Arizona license plates?

A. Because we had to have the certificate of title.

Q. What I meant was why you didn't apply for Arizona certificate of title.

A. Well, we kept expecting any day to receive the certificate of ownership, you know, from Marciano, and it never did come.

Q. I get you. Did you have anything to do with the settlement with this Chadwick and Walden suit, or was it handled by the Doctor?

A. Well, I was there. Yes, I guess I did have something to do with it.

Q. You heard Dr. Lutfy's testimony about the settlement, that is correct as you understand it, is it? A. Oh, yes.

Q. Now, this $5600 telegraphic money order, did you see how the proceeds of that were distributed there in the bank? You got a part of it back?

A. Yes. After I identified myself to the bank employee, I endorsed the check in his presence then. Then he came to Jordan and stepped over to the Cashier's window and cashed it and gave me the change.

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

Q. And did you see him do anything with the part that he kept, give it to anybody else?

A. No.

Q. He didn't give it to anybody in your presence?

A. No, because Marciano was standing by me.

Q. How much did you get back? A. $180.

Q. That was on what date?

A. That was about the 19th.

Q. That is the same day, in any event, that you phoned Dr. Lutfy that you purchased the car?

A. Yes.

Q. When you first saw the car there at the Chicago Motor Sales, did it have any license plates on it? A. No.

Q. Never did until you had the Arizona plates put on? A. I don't know whether it ever did.

Q. No, but I mean while you saw it?

A. No.

Q. This title certificate that was given you by Mr. Jordan, did it show any lien in favor of the Exchange National Bank, or anyone else?

A. I don't know.

Q. You don't remember? A. I don't.

Q. The reason I asked you, Mrs. Lutfy, the information we have is that there was a mortgage on the car to this Exchange National Bank and that a portion of the money that you paid to Jordan was

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

used to pay for that lien. Did you know anything about that at all?

A. Well, I will tell you, when I had the title and I was in such a hurry to get out of Chicago and I went over and saw the model number, '47, and Donald Jordan's name, and, of course, that was all right by me because Marciano had told me that story, and Marciano told me where to sign the title and all, and I signed it and I can see now as long as the car was stolen why that was all in such a hurry.

Q. You didn't notice a lien, any notation of a lien on there in favor of this bank?

A. I really didn't pay any attention.

Q. Or any stamp by the bank that that lien was paid off?

A. I couldn't tell you, I mean I couldn't swear to anything like that.

Q. In any event, you didn't see Jordan pay any of that money over to the bank?

A. All he did, that I saw him do in the bank, was to get the cash on the check, because I endorsed it, gave it to him, he endorsed it, stepped over to the window, cashed it and came back to this pillar with a little bench around it and paid me, and I turned around and talked to Marciano, and we were on our way out of the bank.

Q. I mean you didn't see him go back to the

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

window or any place and pay any money to the bank?

A. As I say, when we first came in, after I met him, he was supposedly one of the officials from the Lincoln Company, Marciano told me, and I saw him talking to people, you know, behind this little railing of this bank, and the official came over with him and I made the identification and we were around this little pillar there.

Q. This bank official was particular about your identification, I take it?

A. Definitely; absolutely.

Q. Did you have to show him some papers?

A. I had to show him my driver's license and I showed him the Western Union telegram that came with the check.

Q. He was particular about it?

A. Oh, very, very.

Q. And did Marciano or Jordan, either one of them, tell you why they wanted to meet at the bank to transact this?

A. I asked Marciano, well, "Why do we have to go to the bank"? "Well," he said, "it is Saturday and the banks close at noontime," and this, that and the other, you know, and he was in a rush to get into the bank before noon and get this all straightened out.

Defendant's Exhibit No. 1—(Continued)

(Deposition of Bertha A. Lutfy.)

Q. Neither one of them told you about there being a mortgage on the car?

A. Not a thing.

Q. The information that you had was that it was a new car on the floor of this Motor——

A. Absolutely. They told us here in Phoenix that it is sitting back there in that display window floor there and it is a new car all right, and all you had to do is to get in the car, don't talk anything about price or anything, just have to get in the car and drive back to Phoenix; very simple.

Q. The first you knew that it was registered in Jordan's name was there at the bank, is that it?

A. That is right; that is right.

Mr. Perry: That is all.

(The witness was excused.)

I hereby certify that I have read the foregoing 19 typewritten pages, and changes, if any, were made by me and initialed in ink, and the same is now a true and correct transcript of my testimony.

/s/ BERTHA A. LUTFY.

State of Arizona,
County of Maricopa—ss.

Be It Known that I took the foregoing depositions pursuant to notice on file herein; that I was then and there a Notary Public in and for the County

Defendant's Exhibit No. 1—(Continued)
(Deposition of Bertha A. Lutfy.)

of Maricopa, State of Arizona, and by virtue thereof authorized to administer an oath; that the witnesses before testifying were duly sworn by me to testify to the truth, the whole truth and nothing but the truth; that said depositions were reduced to typewriting under my direction, and that the foregoing 39 typewritten pages constitute a full, true and accurate transcript of the words and testimony of said witnesses and all proceedings had.

Witness my hand and seal of office this, the 7th day of January, 1949.

[Seal] /s/ LOUIS L. BILLAR,
Notary Public.

My commission expires March 27, 1951.

[Endorsed]: Filed Feb. 10, 1949.

DEFENDANT'S EXHIBIT NO. 2

Feb-11-47 26-59752 -719-600 17.00

Name Don E. Jordan 2704589

Street Address 343 S. Dearborn St.,

City or Town Chicago Zone County Cook Illinois

Name of Car Lincoln Cont., Style of Body Cab., Year Model 1946

Factory No. H-150 200 Engine No. H-150 200

Model 66H No. and Bore of Cyl. 2 15/16 Horse Power 41.4

Written Signature of Owner Don E. Jordan

License Plates bearing above number are assigned to owner named hereon for motor vehicle described for year ending December 31, 1947. Edward J. Barrett, Secretary of State 1947

Defendant's Exhibit No. 2—(Continued)

Send Separate Remittance With Applications for Each Vehicle. Do Not Send Cash or Stamps. Send Check, Draft, or Money Order.

Last Identification Card to Be Attached Here

A title application should accompany this application if an Illinois title has not been issued in your name for this vehicle. If new car purchased dealer must execute Bill of Sale on back of your title application. If used car purchased send assigned title with these applications.

I (We) purchased or acquired the above described motor vehicle New, on January 8, 1947, by Bill of Sale from Motor Sales Co.

Whose Address is 2545 South Michigan Ave., Chicago 16, Illinois
Where did you register car last year? Just bot License No. Just bot When did you bring car to Illinois? Just bot
If Illinois Certificate of Title has been issued by the State in your name, show title number Just bot

Remarks: None

Subscribed and sworn to before me this 8 day of January, 1947
(Seal) Marguerite B. Miller, Notary Public
2545 South Michigan Ave., Chgo.

Office Use Only All Questions Office Use Only
Must Be Answered Fully

Description of Remittance: Draft, Certified Check,
Postal or Exp. M. O. No. $17.50, Peterson
Passenger Car Application
Carrying not more than seven passengers
Edward J. Barrett, Secretary of State
For Instructions, See Opposite Side

164383

Attach to Appl. in Same Name

Name D. E. Jordan 2704589
Street Address 1220 No. State Parkway Duplicate
City or Town Chicago Illinois
Name off Car Lincoln Cont., Style of Body Cab., Year Model 46
Factory No. H 150 200 Engine No. H 150 200 Horse Power 41.4
Written Signature of Owner D. E. Jordan

Defendant's Exhibit No. 2—(Continued)

The following lien is recorded against this vehicle:
Amount $1577.89 Kind of Lien Chat. mgt.
In Favor of Exchange National, 130 S. LaSalle Chgo.
(Stamped Paid 10 16 1947)

Print or Typewrite Name and Address in Full—Use Black Ink Colored Inks, Rubber Stamps, or Pencils Do Not Photograph

Reason for requiring duplicate Lost

Date of purchase of vehicle April 21, 1947

Number of Original Title 2704-589

Last license number 719-600

Is this vehicle used as a taxi-cab? no

Are you still the owner of this vehicle? yes

Who has possession of this vehicle at the present time? me

Name D. E. Jordan

Address 1220 No. State Parkway

(Certificate of Title Issued Oct 18 1947) O K'D

If you have endorsed the original certificate of title, to whom did you endorse it?

Name
Address

If original title was mailed to lienholder, this application must be accompanied by a statement from the lienholder that the original title is not in his custody.

This application must be executed by person to whom lost title was issued.

Subscribed and sworn to before me this 16th day of October, 1947.
(Seal) Phyllis L. Kamis, Notary Public
343 So. Dearborn St.

Mail Certificate of Title to D. E. Jordan
Address 343 So. Dearborn St., Chicago, Illinois

Application for Duplicate Certificate of Title
For Any Motor Vehicle, Trailer, and Semi-Trailer
Certificate of Title Fee 50c—Required by Law
Edward J. Barrett, Secretary of State
A. R. Millard

For Duplicate Title Only For Duplicate Title Only
(Stamped Checked Oct. 17, 1947 E. Hart)

Defendant's Exhibit No. 2—(Continued)

Oct-18-47 17-7608 DT 2-704-589 2 0.50

Application for Duplicate Certificate of Title for Motor Vehicle

(Read instructions carefully) Oct 17 1947

Answer all questions fully. Incomplete applications or incorrect fees will be returned.

Do Not Send Currency or Stamps. The Secretary of State will assume no responsibility for loss. Send Certified Check, Draft or Money Order With Each Individual Application.

Duplicates will only be issued in case Secretary of State is satisfied original is lost or destroyed, and upon Oath of applicant to that effect.

Cost of duplicate Titles, 50 cents each.

This application must be signed in same manner as original.

Duplicate will not be issued unless signature agrees with the signature on the Original Application.

If original title is in joint names, both parties must sign this application.

If the party in whose name original was issued is deceased, Copy of Letters of Administration, or Court Order, must accompany this application.

Trustee must attach Copy of Appointment by Court.

If applicant can not sign name, his or her mark must be witnessed by third person before notary.

Any person knowingly making a false statement in any application for Certificate of Title or any other document required by the Motor Vehicle Anti-Theft Act, may be punished by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both. (16 Motor Vehicle Anti-Theft Act.)

Law Limits Fee of Notary Public to Not More Than 25c

Edward J. Barrett, Secretary of State

Name Donald E. Jordan 2704-589

Address 1220 N. State Parkway

City or Town Chicago County Cook Illinois

Name of Car Lincoln Cont., Style of Body Cab., Year Model 1946

Factory No. H-150 200 Engine No. H-150 200 Horsepower 41.4

Defendant's Exhibit No. 2—(Continued)

Signature of Owner D. E. Jordan

Apr. 21, 1947

This vehicle is subject to the following lien:

Amount $1577.89 Kind of Lien chattel mtg.
In Favor of Exchange National Bank, 130 S. LaSalle St.

If this vehicle is used as a taxi-cab, place the word "Taxi" in addition to style of body, in style of body space above.

Print or Typewrite Name and Address in Full
Use Black Ink

Colored Inks, Rubber Stamps, or Pencils Do Not Photograph
Reason for requiring correction:—Check reason—

To register a lien xx To correct an address ✓

(Other reasons not filled out)

(Certificate of Title stamp Issued Apr 21 1947)

Imperative—Return incorrect title: Number

This application authorizes the Secretary of State to change any records affected by this application.

Subscribed and sworn to before me this 10 day of April, 1947.
(Seal) William Finucci, Notary Public
130 So. LaSalle St.

Mail Certificate of Title to Exchange National Bank
Address 130 S. LaSalle St., Chicago, Illinois

All Questions Must Be Answered Fully
Application for Corrected Certificate of Title
For Any Motor Vehicle
To Be Used When Original Title Is in Error
Certificate of Title Fee 50c—Required by Law
Edward J. Barrett, Secretary of State
For Instructions, See Opposite Side

(Stamped Checked Apr 17 1947 Bogenschutz)

For Title Correction For Title Correction

Name Don E. Jordan 2704589
Street Address 343 S. Dearborn St.,
City or Town Chicago Zone County Cook Illinois
Name off Car Lincoln Cont., Style of Body Cab., Year Model 1946

Defendant's Exhibit No. 2—(Continued)

Factory No. H-150 200 Engine No. H-150 200 Horse Power 41.4

Written Signature of Owner Don E. Jordan

This vehicle is subject to the following lien: None

Print or Typewrite Above, Use Black Ink Only

Instructions

1. All questions must be answered in full.
2. Applicant must sign personally.
3. If application is in the name of a firm, the firm name must be countersigned by an authorized official of the company.
4. If application is in two or more names, each individual must sign.
5. Application must be properly acknowledged.
6. Amount and kind of lien, name and address of lien holder must be given.
7. If purchased new have dealer complete Bill of Sale form on back of this application.
8. If purchased used, attach the Certificate of Title assigned to you by the seller.
9. Before accepting an assigned title, liens on face of title must be stamped paid and signed by lien holder or an authorized official.
10. Any changes, erasures, mutilations, ink eradications upon Bill of Sale, Certificate of Title, Certificate of Origin voids assignment and will not be accepted.

I (We) acquired the above car New x on January 8 1947
From Motor Sales Co.
Whose address is 2545 South Michigan Ave., Chicago 16, Ill.
Have you operated this car in Illinois? Just bot
Do you intend to operate this car? Yes
When did you bring this car to Illinois? Just bot
Are you a licensed dealer in cars? No
Remarks: None

Subscribed and sworn to before me this 8 day of January, 1947
(Seal) Marguerite B. Miller, Notary Public
2545 South Michigan Ave., Chgo., Ill.

(Stamped Certificate of Title Issued Feb 26 1947)

Defendant's Exhibit No. 2—(Continued)

Mail Certificate of Title to Don E. Jordan
Address 343 S. Dearborn St., Chicago, Illinois
(In Ink 17.50 Peterson)

Surrendered Title Number.....
Application for Certificate of Title Only
For Any Motor Vehicle, Trailer, or Semi-Trailer
Certificate of Title Fee 50c—Required by Law
Edward J. Barrett, Secretary of State

For Title Only For Title Only

Feb-11-47 26-59753 -719-600 0.50

Application for Certificate of Title for Motor Vehicle
(Read instructions carefully)

Answer all questions fully. Incomplete applications or incorrect fees will be returned.

Do Not Send Currency or Stamps, as the Secretary of State will not accept stamps and will assume no responsibility for the loss of currency. Send Certified Check, Draft, Postal or Express Money Order With Applications.

The law requires both factory and engine numbers on application. Where factory and engine numbers are the same, write "No Number" in the factory number space.

Certificate of Title must be assigned and delivered to purchaser.

The Motor Vehicle Anti-Theft Act, approved May 11, 1933, provides that the Secretary of State shall not after January 1, 1934, register or renew a registration of any motor vehicle, unless and until the owner shall make application for and be granted a Certificate of Title. (Sec. 3 (a).)

The Fee for Certificate of Title Is 50c.

An owner who registers a vehicle does not apply for a Title each year. His original Certificate of Title is valid as long as he retains that vehicle.

Any person knowingly making a false statement in any application for Certificate of Title or any other document required by the Motor Vehicle Anti-Theft Act, may be punished by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both. (Sec. 16 Motor Vehicle Anti-Theft Act.)

If application is for registration of a New car purchased from

Defendant's Exhibit No. 2—(Continued)

a dealer for which a Certificate of Title has not previously been issued, Dealer must complete bill of sale form at bottom of application. (Sec. 4 (b).)

Law Limits Fee of Notary Public to Not More Than 25c

The undersigned statements were subscribed and sworn to before me this 8 day of January, 1947.

(Seal) Marguerite B. Miller, Notary Public
2545 South Michigan Ave., Chgo., Ill.

Firm Name Motor Sales Co. of 2545 South Michigan Ave., Chicago 16, Ill., in consideration of $4848.00 do hereby sell on 1-8-47 a Lincoln Cont. Cab., Year Model 1946, Model 66H, Horsepower 41.4, Factory No. H-150 200, Engine No. H-150 200

This motor vehicle is equipped with safety glass wherever glass is used in doors, windows, windshields, etc. Yes

To Don E. Jordan of 343 S. Dearborn St., Chicago, Illinois.

(Original Bill of Sale)

The undersigned is the lawful and legal owner of the above described new automobile and guarantees it to be free from all mortgages, mechanic's lien, finance loans, and conditional sales contracts, notes or any encumbrance.

With the following exceptions:

There is a lien or encumbrance of None

Dealer's License Number 5111

(Stamped Apr 18 1947)

Signature of Seller Motor Sales Co.
By E. Zientek (Agent of Company)
Signature of Buyer Don E. Jordan

Edward J. Barrett, Secretary of State

State of Illinois
The Secretary of State
Certificate of Title of a Motor Vehicle
(Stamped Surrendered Title Apr 18 1947)

I, Edward J. Barrett, Secretary of State of the State of Illinois, do hereby certify that application has been made to me for a certificate of title of a motor vehicle described as follows:

Name Don E. Jordan Title No. 2704589

Street Address 343 S. Dearborn St.,

Defendant's Exhibit No. 2—(Continued)

City or Town Chicago Zone County Cook Illinois
Name of Car Lincoln Cont., Style of Body Cab., Year Model 1946
Factory No. H-150 200 Engine No. H-150 200 Horse Power 41.4
Written Signature of Owner Don E. Jordan
This vehicle is subject to the following lien: None

Applicant has stated under oath that said applicant is the owner of said motor vehicle and that it is subject to the above liens and encumbrances and no others.

I do further certify that I have used reasonable diligence in ascertaining that the facts stated in said application for a certificate of title are true. Therefore, I certify that the above named applicant has been duly registered in my office as the lawful owner of the above described motor vehicle, and it appears upon the official records of my office that at the date of the issuance of this certificate said motor vehicle is subject to the liens hereinbefore enumerated.

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State of Illinois, at Springfield. Feb 25 1947

Edward J. Barrett, Secretary of State.

(Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations)

State of Illinois
The Secretary of State
Certificate of Title of a Motor Vehicle

I, Edward J. Barrett, Secretary of State of the State of Illinois, do hereby certify that application has been made to me for a certificate of title of a motor vehicle described as follows:

(Stamped Surrendered Title Oct 24 1947)

A 76717

Name D. E. Jordan 2704589
Street Address 1220 No. State Parkway Duplicate
City or Town Chicago Illinois
Name of Car Lincoln Cont., Style of Body Cab., Year Model 46
Factory No. H 150 200 Engine No. H 150 200 Horse Power 41.4
Written Signature of Owner D. E. Jordan
The following lien is recorded against this vehicle:

Defendant's Exhibit No. 2—(Continued)

Amount $1577.89 Kind of Lien Chat. mgt.

In Favor of Exchange National, 130 S. LaSalle, Chgo.

(Stamped illegible)

Applicant has stated under oath that said applicant is the owner of said motor vehicle and that it is subject to the above liens and encumbrances and no others.

I do further certify that I have used reasonable diligence in ascertaining that the facts stated in said application for a certificate of title are true. Therefore, I certify that the above named applicant has been duly registered in my office as the lawful owner of the above described motor vehicle, and it appears upon the official records of my office that at the date of the issuance of this certificate said motor vehicle is subject to the liens hereinbefore enumerated.

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State of Illinois, at Springfield. Oct 18 1947

Edward J. Barrett, Secretary of State.

(Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations)

To be filled in by seller and delivered with vehicle to the purchaser. Application for new certificate of title must be made and immediately forwarded to the Secretary of State with fee of 50c.

Assignment of Title

For Value Received (We) Hereby Sell and Assign to

Henry Green 2847 Washington Blvd. Chgo, Ill.

The motor vehicle described on the reverse side of this certificate and I (we) hereby warrant the title of the said motor vehicle to be free from all liens and encumbrances except as follows:

Amount of Lien $ none Kind of Lien

In favor of

Signature D. E. Jordan, Seller

Subscribed and sworn to before me this 22 day of October 1947

William H. Roberts (Notary Public) (Seal)

My Commission Expires Sept. 29, 1951

(No data in rest of form)

Defendant's Exhibit No. 2—(Continued)

MF 7

Name Henry Green Title No. A 76717

Street Address 2847 Washington Blvd. 63

City or Town Chicago Zone County Cook Illinois

Name of Car Lin. Cont. Style of Body Cab. Year Model 46

Factory No. H 150-200 Engine No. H 150-200 Horse Power 41.4

Written Signature of Owner Henry Green

This vehicle is subject to the following lien : None

Print or Typewrite Above, Use Black Ink Only

Instructions

1. All questions must be answered in full.
2. Applicant must sign personally.
3. If application is in the name of a firm, the firm name must be countersigned by an authorized official of the company.
4. If application is in two or more names, each individual must sign.
5. Application must be properly acknowledged.
6. Amount and kind of lien, name and address of lien holder must be given.
7. If purchased new have dealer complete Bill of Sale form on back of this application.
8. If purchased used, attach the Certificate of Title assigned to you by the seller.
9. Before accepting an assigned title, liens on face of title must be stamped paid and signed by lien holder or an authorized official.
10. Any changes, erasures, mutilations, ink eradications upon Bill of Sale, Certificate of Title, Certificate of Origin voids assignment and will not be accepted.

(Stamped Certificate of Title Issued Oct 24 1947)

I acquired the above car Used on Oct. 21, 1947

From D. E. Jordan

Whose address is 1220 N. State Pk.way, Chgo, Ill.

Have you operated this car in Illinois? No

Do you intend to operate this car? No

When did you bring this car to Illinois? ——

Defendant's Exhibit No. 2—(Continued)

Are you a licensed dealer in cars? Yes
Remarks:

Subscribed and sworn to before me this 22 day of October 1947
(Seal) William H. Roberts, Notary Public

My Commission Expires Sept. 29, 1951 7852 Champlain

Mail Certificate of Title to Henry Green
Address 2847 Washington Blvd., Chicago, Ill.

Surrendered Title Number 2704589 Ill.
Application for Certificate of Title Only
For Any Motor Vehicle, Trailer, or Semi-Trailer
Certificate of Title Fee 50c—Required by Law
Edward J. Barrett, Secretary of State
A. R. Millard (stamped)

For Title Only For Title Only

Oct-24-47 7 10400 To A- 76-717 2 0.50 7

Application for Certificate of Title for Motor Vehicle
(Read instructions carefully)

Answer all questions fully. Incomplete applications or incorrect fees will be returned.

Do Not Send Currency or Stamps, as the Secretary of State will not accept stamps and will assume no responsibility for the loss of currency. Send Certified Check, Draft, Postal or Express Money Order With Applications.

The law requires both factory and engine numbers on application. Where factory and engine numbers are the same, write "No Number" in the factory number space.

Certificate of Title must be assigned and delivered to purchaser.
Oct 23 1947

The Motor Vehicle Anti-Theft Act, approved May 11, 1933, provides that the Secretary of State shall not after January 1, 1934, register or renew a registration of any motor vehicle, unless and until the owner shall make application for and be granted a Certificate of Title. (Sec. 3 (a).)

The Fee for Certificate of Title Is 50c.

An owner who registers a vehicle does not apply for a Title each year. His original Certificate of Title is valid as long as he retains that vehicle.

Defendant's Exhibit No. 2—(Continued)

Any person knowingly making a false statement in any application for Certificate of Title or any other document required by the Motor Vehicle Anti-Theft Act, may be punished by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both. (Sec. 16 Motor Vehicle Anti-Theft Act.)

If application is for registration of a New car purchased from a dealer for which a Certificate of Title has not previously been issued, Dealer must complete bill of sale form at bottom of application. (Sec. 4 (b).)

Law Limits Fee of Notary Public to Not More Than 25c
(No information filled in remainder of this form)
Edward J. Barrett, Secretary of State

State of Illinois
The Secretary of State
Certificate of Title of a Motor Vehicle

I, Edward J. Barrett, Secretary of State of the State of Illinois, do hereby certify that application has been made to me for a certificate of title of a motor vehicle described as follows:

(Stamped Surrendered Title Nov 3 1947)

Name Henry Green A 76717
Street Address 2847 Washington Blvd. 63
City or Town Chicago Zone County Cook Illinois
Name of Car Lin. Cont. Style of Body Cab. Year Model 46
Factory No. H 150-200 Engine No. H 150-200 Horse Power 41.4
Written Signature of Owner Henry Green
This vehicle is subject to the following lien: None

Applicant has stated under oath that said applicant is the owner of said motor vehicle and that it is subject to the above liens and encumbrances and no others.

I do further certify that I have used reasonable diligence in ascertaining that the facts stated in said application for a certificate of title are true. Therefore, I certify that the above named applicant has been duly registered in my office as the lawful owner of the above described motor vehicle, and it appears upon the official records of my office that at the date of the issuance of this certificate said motor vehicle is subject to the liens hereinbefore enumerated.

Defendant's Exhibit No. 2—(Continued)

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State of Illinois, at Springfield. Oct 24 1947

Edward J. Barrett, Secretary of State.

(Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations)

(Stamped A 98944)

To be filled in by seller and delivered with vehicle to the purchaser. Application for new certificate of title must be made and immediately forwarded to the Secretary of State with fee of 50c.

Assignment of Title

For Value Received I (We) Hereby Sell and Assign to

Henry Greenspon, 1503 So. Komensky Ave., Chicago, Ill.

The motor vehicle described on the reverse side of this certificate and I (we) hereby warrant the title of the said motor vehicle to be free from all liens and encumbrances except as follows:

Amount of Lien $ None Kind of Lien

In favor of

Signature Henry Green, Seller

Fred Klein, Notary Public

(Seal)

Subscribed and sworn to before me this 31 day of October 1947

Re-Assignment by Dealer (form blank)

Oct-31-47 40 26160 1-717-938 850

Name Henry Greenspon A 98944

Street Address 1503 So. Komensky Ave.

City or Town Chicago Zone 23 County Cook Illinois

Name of Car Lincoln Cont., Style of Body Cab., Year Model 1946

Factory No. H. 150200 Engine No. H. 150200

Model 1946 No. and Bore of Cyl. 12 Horse Power 41.4

Written Signature of Owner Henry Greenspon

License Plates bearing above number are assigned to owner named hereon for motor vehicle described for year ending Decembr 31, 1947. 1947

Edward J. Barrett, Secretary of State

Send Separate Remittance With Applications for Each Vehicle. Do Not Send Cash or Stamps. Send Check, Draft, or Money Order.

Defendant's Exhibit No. 2—(Continued)

Last Identification Card to Be Attached Here

A title application should accompany this application if an Illinois title has not been issued in your name for this vehicle. If new car purchased dealer must execute Bill of Sale on back of your title application. If used car purchased send assigned title with these applications.

I (We) purchased or acquired the above described motor vehicle used on 10 27, 1947, by Bill of Sale from Henry Green Whose Address is 2847 Washington Blvd., Chicago, Ill.

Where did you register car last year? License No.

When did you bring car to Illinois?

If Illinois Certificate of Title has been issued by the State in your name, show title number A 76717

Remarks:

Subscribed and sworn to before me this 31 day of Oct., 1947

(Seal) /s/ M. Comath

Office Use Only All Questions Must Be Answered Fully Office Use Only

9.00 /s/ Comath

Description of Remittance:

Draft, Certified Check, Postal or Exp. M. O. No.

Passenger Car Application

Carrying Not More Than Seven Passengers

Edward J. Barrett, Secretary of State

For Instructions, See Opposite Side Batch # 1

Name Henry Greenspon Title No. A 98944

Street Address 1503 So. Komensky Ave.

City or Town Chicago Zone 23 County Cook Illinois

Name of Car Lincoln, Cont., Style of Body Cab., Year Model 1946

Factory No. H. 150200 Engine No. H. 150200 Horse Power 41.4

Written Signature of Owner Henry Greenspon

This vehicle is subject to the following lien: none

Instructions

1. All questions must be answered in full.
2. Applicant must sign personally.
3. If application is in the name of a firm, the firm name must be countersigned by an authorized official of the company.

Defendant's Exhibit No. 2—(Continued)

4. If application is in two or more names, each individual must sign.
5. Application must be properly acknowledged.
6. Amount and kind of lien, name and address of lien holder must be given.
7. If purchased new have dealer complete Bill of Sale form on back of this application.
8. If purchased used, attach the Certificate of Title assigned to you by the seller.
9. Before accepting an assigned title, liens on face of title must be stamped paid and signed by lien holder or an authorized official.
10. Any changes, erasures, mutilations, ink eradications upon Bill of Sale, Certificate of Title, Certificate of Origin voids assignment and will not be accepted.

Print or Typewrite, Use Black Ink Only

I (We) acquired the above car Used on Oct. 27, 1947.
From Henry Green
Whose address is 2847 Washington Blvd., Chicago, Ill.
Have you operated this car in Illinois? No
Are you a licensed dealer in cars? No
When did you bring this car to Illinois?

Subscribed and sworn to before me this 31 day of October, 1947

(Seal) Fred Klein, Notary Public
1606 W. 79th St.

(Stamped Certificate of Title Issued Nov 3 1947)
Mail Certificate of Title to Henry Greenspon
c/o Gen Del., Miami, Florida 9.00
Surrendered Title Number A 76717

Application for Certificate of Title Only
For Any Motor Vehicle, Trailer, or Semi-Trailer
Certificate of Title Fee 50c—Required by Law
Edward J. Barrett, Secretary of State

For Title Only Batch # 1 For Title Only

Admitted and filed Feb. 10, 1949.

DEFENDANT'S EXHIBIT NO. 3

State of Florida
Office of Motor Vehicle Commissioner
Tallahassee

State of Florida :
County of Leon :

I, John Kilgore, Motor Vehicle Commissioner of the State of Florida, hereby certify the attached photostatic copies are true and correct copies of the records on State of Florida Certificate of Title # 2129701 A covering 1946 Lincoln Conv. Coupe, Engine # H 150200, Serial # H 150200 in the name of Paul G. Horvath, 368 NE 57th St., Miami, Florida and 1947 Florida Registration Card on license # 1W-19978 issued to Paul G. Horvath for use on the above vehicle. Also original application for Florida Title in name of Henry Greenspon on above vehicle and Illinois Title # A 98944 held in this office as proof of ownership, according to the copies on file and of record in my office.

Given under my hand and seal this 4th day of February, A.D. 1948.

John Kilgore
Motor Vehicle Commissioner

Date Dec 18, 47 Transfer No. 99134

State of Florida
Transfer of Motor Vehicle Registration

License Tag Number 1W 19978
T. C. No. 2129701 A Kind of Car Lincoln Conv Coupe
Eng. No. H 150200 Model 56 Cyls 12
Serial No. Year Make 1946
Weight Capacity
Name of New Owner Paul G. Horvath
Address 368 NE 57th St., Miami, Fla.
Former Owner Henry Greenspon
Application for transfer of For Hire Certificate with remittance of $1.00 is required on all For Hire tags. This is in addition to transfer of Title Certificate application.

ar
Motor Vehicle Commissioner
Tallahassee
Florida

Defendant's Exhibit No. 3—(Continued)

1947 Florida Automobile Registration Card 1947
(This Is Not a Title Certificate)

Owner Henry Greenspon 1W19978
St. Address William Penn Hotel
County Dade City Miami Beach Florida
Make Lincoln Type Cont. Date 11/13/47
Eng. No. H150200 '46 Tag No. Ill. No. Cyls. 12
Weight 4116 Pass. Capacity T. C. No. AF. Ill.
Date Acquired 47 Year Make 46 Model 56
Serial No. Use pri. No. Wheels
Kind of Fuel Used (Gasoline, Diesel or other) gas
Amt. Sent With Appn. $ XX 5.00 Additional Paid $
Mail Plate To (Name & Address)
George H. Asbell,
Motor Vehicle Commissioner,
Tallahassee, Florida
25c Service Fee on Each Application

Appn. Number 393336
Cert. Number 2129701-A Tallahassee, Fla., Dec. 18, 1947

Satisfactory proof having been made under Chapter 9157, Acts of 1923, described is vested in the owner named below. This official Certificate of Title as follows:

Name and Make Lincoln Type Conv Coupe
Engine Number H150200 Model 56 Cyls.
Serial No. H150200 Year of Make 1946 Other des
Tag No.

Name: Paul G. Horvath
Address: 368 NE 57th St., Miami, Florida
(Stamped Mailed)
Florida License Plates Are Not Transferable From Car to Car

Defendant's Exhibit No. 3—(Continued)

Application No. 393336 Dec 18 47 Title Certif. No. 2129701

Combination Application for Duplicate and Transfer of Motor Vehicle Title Certificate

George H. Asbell,
Motor Vehicle Commissioner, Tallahassee, Florida

Amount Sent With This Application $1.50
99134 (in margin)

MO CR CT EO C BCK ✓ ACK

Former Owner Use This Column

The Certificate of Title covering the motor vehicle described below, now of record in my name has been lost or destroyed and I hereby apply for a duplicate and assign the same to:
Paul G. Horvath
Address 368 N.E. 57th St.
City & State Miami, Fla.

New Owner Use This Column

I hereby apply for the transfer to my name of Title Certificate covering the motor vehicle described below, subject to liens as below stated (if any):

(Stamped Mailed Dec 18 1947 R.F.C. File)

Description of Car

Title Certif. No. App. for
Make Lincoln Cont. Type Conv. Cpe
Eng. No. H 150200 Serial No. H 150200
Liens of Indebtedness: None

Signed: Henry Greenspon
(Signature of Applicant for Duplicate)

Sworn to and subscribed before me this 22 day of November A.D., 1947.

(Affix Seal) Seal and /s/ [Indistinguishable]

Both Columns Above Must Be Signed and Attested.

Liens or Indebtedness: None
(Stamped Dec 18 1947 O.K. Dec 18 1947)
Signed: (Signature of New Owner) Paul G. Horvath
Address 368 NE 57 St, Miami

Sworn to and subscribed before me this 24 day of November A.D., 1947.

(Affix Seal) Seal and /s/ Maurice Arsenault.

Tag No. 1W 19978 162678

Defendant's Exhibit No. 3—(Continued)

(Do Not Detach Here)

Application No. 547901 Dec. 18, 1947 Certificate No. 2129701

Certificate of Title Application

C MO CR CT EO BCK P BCK $1.00

Name Henry Greenspon

Street No. or P.O. Box William Penn Hotel

Address: City or Town Miami Beach County Dade Florida

Geo. H. Asbell,

Motor Vehicle Commissioner, Tallahassee, Fla.

1. I (We) Henry Greenspon The owner (owners) of following described Motor Vehicle make application for Certificate of Title of Ownership for said vehicle and for that purpose state under oath the following facts:
2. Make Lincoln Type Conv. Cpe
3. Model Continental Cyls. 12 4. Year of Make 1946
5. Wheels 4 6. Eng. No. H 150200
7. Serial No. H 150200 8. Chasis No. ——
9. Is the Motor Vehicle Licensed in your name? Yes
10. Tag No. Ill. 1W19978 1-717-938
11. I (We) acquired the above described Motor Vehicle 2nd Hand
12. From Individual
13. Whose address is Chicago, Ill.
14. The 27 day of Oct, 1946 15. How acquired Purchase
(Stamped Dec 18 1947)

Liens or Indebtedness

16. Amount at present time None 17, 18 blank
19. Signature of Applicant Henry Greenspon 156840
20. Signature of Person signing for Firm or Corporation
21. State of Florida County of Dade (Stamped R.F.C. File)

On this 12th day of November A.D., before me a Notary personally appeared Henry Greenspon who makes oath that the matters set forth in the foregoing application are true.

(Seals) Mario Hernandez O.

(Affix Official Seal)

(Stamped Nov 26 1947 O.K. Dec 18 1947 O.K.)

My Commission Expires July 28, 1951.

Defendant's Exhibit No. 3—(Continued)

State of Illinois
The Secretary of State
Certificate of Title of a Motor Vehicle

I, Edward J. Barrett, Secretary of State of the State of Illinois, do hereby certify that application has been made to me for a certificate of title of a motor vehicle described as follows:

Name Henry Greenspon Title No. A 98944
Street Address 1503 So. Komensky Ave.
City or Town Chicago Zone 23 County Cook Illinois
Name of Car Lincoln Cont., Style of Body Cab., Year Model 1946
Factory No. H. 150200 Engine No. H. 150200 Horse Power 41.4
Written Signature of Owner Henry Greenspon
This vehicle is subject to the following lien: None

Applicant has stated under oath that said applicant is the owner of said motor vehicle and that it is subject to the above liens and encumbrances and no others.

I do further certify that I have used reasonable diligence in ascertaining that the facts stated in said application for a certificate of title are true. Therefore, I certify that the above named applicant has been duly registered in my office as the lawful owner of the above described motor vehicle, and it appears upon the official records of my office that at the date of the issuance of this certificate said motor vehicle is subject to the liens hereinbefore enumerated.

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State of Illinois, at Springfield. Nov 3 1947

Edward J. Barrett, Secretary of State.

(Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations)

To be filled in by seller and delivered with vehicle to the purchaser. Application for new certificate of title must be made and immediately forwarded to the Secretary of State with fee of 50c.

Assignment of Title

For Value Received I (We) Hereby Sell and Assign to
(Questions unanswered here)
2129701
Signature Henry Greenspon, Seller
Mario Hernandez O., Notary Public
(Seal)

Re-Assignment by Dealer (form blank)

[Endorsed]: Filed Feb. 10, 1949.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

The following is a record of the action taken at the pre-trial conference February 7, 1949, and February 10, 1949, including the amendments allowed to the pleadings and the agreements made by the parties:

1. Defendant's motion for leave to amend its answer, heretofore filed herein, is granted.

2. The court finds the following facts to be established by the record:

(a) Plaintiffs Louis P. Lutfy and Bertha A. Lutfy are husband and wife. Each of them is a citizen and resident of the State of Arizona. Defendant, The London Assurance, is a corporation duly organized and existing under the laws of the Kingdom of Great Britain and is a corporate subject and resident of said Kingdom;

(b) The amount in controversy in this suit exceeds the sum of three thousand dollars, exclusive of interest and costs.

3. The policy of insurance referred to in the plaintiffs' complaint is admitted in evidence as "Plaintiffs' Exhibit A."

4. The depositions of the plaintiffs (in one document) are admitted in evidence as "Defendant's Exhibit 1."

5. Photostatic copy of the record of the Secretary of State of the State of Illinois, relative to the automobile described in the insurance policy above referred to (eight documents bradded together) is admitted in evidence as "Defendant's Exhibit 2."

6. Photostatic copy of the record of the Motor Vehicle Commissioner of the State of Florida (six documents bradded together) is admitted in evidence as "Defendant's Exhibit 3."

7. The parties agree as to the following facts:

(a) The automobile described in the policy of insurance was actually a 1946 year model and manufactured during that year. It had an actual cash value of $5,420.00 at all times here material.

(b) Defendant has made no payment to the plaintiffs. Defendant denies liability to the plaintiffs.

(c) Defendant raises no question as to the plaintiffs giving due or timely notice of claim, or of their tendering "proof of loss" to the defendant.

(d) Under date of February 4, 1948, defendant transmitted to the plaintiffs the letter set forth in the document denominated "tender" heretofore filed herein, and with such letter transmitted to the plaintiffs check #1413, drawn by J. A. Wamsley General Agency (general agent for the defendant at Phoenix, Arizona), upon the First National Bank of Arizona, in the sum of $159.00.

Such check was retained by the plaintiffs, but not endorsed, cashed or otherwise disposed of by them. Plaintiffs' counsel, in open court and during this pre-trial conference, has returned such check to counsel for defendant. Under date of May 14, 1948, defendant filed herein said document denominated "tender," and deposited with the Clerk of this Court the sum of $165.32 pursuant thereto. Such sum has not been withdrawn, in whole or in part, by either party hereto.

8. Plaintiffs move for judgment in their favor, upon the basis of this pre-trial order.

9. Defendant moves for judgment in its favor, upon the basis of this pre-trial order.

10. Each of such motions is by the court taken under advisement.

Done in Open Court this 10th day of February, 1949.

/s/ DAVE W. LING,
United States District Judge.

Approved:

STRUCKMEYER & STRUCKMEYER,
Attorneys for Plaintiffs.

By /s/ JAMES A. STRUCKMEYER,

KRAMER, MORRISON, ROCHE & PERRY,
Attorneys for Defendant.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed Feb. 10, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

The parties hereto having submitted, by stipulation, the issues in this matter to the Court and the Court having considered the pleadings herein, the depositions of the plaintiffs, and the exhibits introduced, the Court finds:

1. The defendant is a corporation qualified and permitted to write insurance upon automobiles in the State of Arizona.

2. On September 19, 1947, in Phoenix, Arizona, the defendant insured the plaintiffs against any loss arising from the theft of one certain automobile described as a 1947 Lincoln Continental Convertible Cabriolet, and received the premium for the said insurance.

3. The said automobile was insured under the policy in the amount of $5,420.00 and the parties hereto have stipulated that on all dates to be considered by the Court the said automobile was of an actual value of $5,420.00.

4. The equipment carried in the automobile was of a reasonable value of $77.00.

5. On the 28th day of October, 1947, the said automobile was stolen from the possession of the plaintiffs and has not been recovered by the plaintiffs. On the date of the theft the policy was in full force and effect.

6. The plaintiffs have done and performed all

of the conditions of the insurance policy as required by them.

7. The defendant is obligated to the plaintiffs under the said policy in the following amounts:

a. The principal sum of $5,420.00.

b. In the further sum of $77.00 for equipment carried in the automobile.

c. In the additional sum of $150.00 for reasonable expenses incurred by the plaintiffs after the theft.

Each of the said sums to draw interest at the rate of 6% from the 28th day of November, 1947, until paid, and

It Is Further Ordered that judgment herewith be entered according to the terms of this Memorandum.

Dated this 25th day of February, 1949.

/s/ DAVE W. LING,
Judge.

Approved as to Form this .... day of February, 1949.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 25, 1949.

In the United States District Court
for the District of Arizona

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF TUESDAY, APRIL 12, 1949

It Is Ordered that the record show that the Court finds as follows herein:

The judgment in this case was improvidently entered and is vacated. The Court erroneously assumed that all issues raised by the pleadings were settled by admissions at pre-trial conference. This is not the fact.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs herein and submit to the Court the attached Findings of Fact and Conclusions of Law in the above entitled matter.

STRUCKMEYER &
STRUCKMEYER,
By /s/ JAMES A. STRUCKMEYER,
Attorneys for Plaintiffs.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties hereto having submitted by stipulation the issues in this matter to the Court upon a Motion for Judgment based upon a pre-trial order heretofore entered by this Court, and the Court having considered the pleadings herein, the depositions and the Exhibits, the Court finds:

1. Plaintiffs, Louis P. Lutfy and Bertha A. Lutfy, are husband and wife; each of them is a citizen and resident of the State of Arizona. Defendant, the London Assurance, is a corporate subject and resident of the Kingdom of Great Britain.

2. The amount in controversy exceeds the sum of Three Thousand Dollars, exclusive of interest and costs.

3. On September 19, 1947 defendant issued to plaintiffs a policy of insurance wherein and whereby defendant did, subject to all of the terms and conditions in said policy contained, agree to indemnify plaintiffs for a term commencing the nineteenth day of September, 1948, against loss or damage to the plaintiffs resulting directly from the theft of a certain Lincoln Continental Convertible Coupe, year model 1947, motor number H-150200, to the extent of the actual cash value of such automobile, or of the damage thereto resulting from theft as aforesaid, and as in the said policy defined, as of the day of the date of such loss or damage.

4. That at and prior to the issuance of said

policy of insurance, and as an inducement to the defendant to issue the same, the plaintiffs represented to the defendant:

(a) That the automobile for which such insurance was desired was of the year model 1947 and had been actually manufactured that year;

(b) That plaintiffs had purchased said automobile in September, 1947 and that said automobile was a new car when they had so purchased it;

(c) That plaintiffs had paid the sum of $5,420.00 for such automobile;

(d) That plaintiffs were the sole and unconditional owners of said automobile.

5. Defendant believed such representations and each thereof, and relied upon them and relied upon each thereof, and issued said policy of insurance induced by and believing and relying upon said representations and each thereof.

6. Each of said representations was true, except that said automobile was of the year model 1946 and had been manufactured in that year. Plaintiffs however, believed that said automobile was a 1947 model, and manufactured that year, when they made said representation.

7. Defendant has heretofore tendered the return of the premium paid by the plaintiffs for said policy of insurance with lawful interest thereon.

8. On or about the 28th day of October, 1947, the said automobile was stolen from the possession of the plaintiffs and has not been recovered by the plaintiffs and the plaintiffs have thereby been permanently deprived of the use and enjoyment of said

motor vehicle which upon the date given above was of an agreed value of $5,420.00.

9. The plaintiffs have done and performed all of the conditions of the insurance policy between the parties as required by them and the defendant has notified the plaintiffs that the defendant does not intend to pay and will not pay the liability incurred upon the said policy of insurance, and will pay nothing on account of said policy.

Conclusions of Law

1. The court has jurisdiction of the parties and of the subject matter of the action.

2. The plaintiffs are entitled to recover from the defendant upon the policy of insurance the admitted value of the automobile, to-wit, $5,420.00.

Dated: December 6, 1949.

/s/ DAVE W. LING,
Judge.

STRUCKMEYER &
STRUCKMEYER,
By /s/ JAMES A. STRUCKMEYER,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

Plaintiffs' Proposed Findings of Facts and Conclusions of Law.

[Endorsed]: Filed Oct. 21, 1949.

Findings of Facts and Conclusions of Law.

[Endorsed]: Filed Dec. 6, 1949.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFFS

I.

The defendant objects to the plaintiffs' finding of fact number 6, for the reason (a) there is no evidence to support that portion of the finding reading as follows: "Each of said representations was true, * * *," and (b) there is no evidence to support that portion of the finding reading, "Plaintiffs, however, believed that said automobile was a 1947 model, and manufactured that year, when they made said representation." Each of such quoted portions of said proposed finding is contrary to the evidence and the admissions of the parties.

II.

Defendant objects to the plaintiffs' proposed finding of fact number 8, for the reason that the same is contrary to the evidence and the admissions of the parties.

III.

The defendant objects to that portion of the plaintiffs' proposed finding of fact number 9, reading "The plaintiffs have done and performed all of the conditions of the insurance policy between the parties as required by them * * *" for the reason

that the same is contrary to the evidence and the admissions of the parties.

IV.

The defendant objects to the plaintiffs' proposed conclusion of law number 2, for the reason that the same is contrary to the law applicable to the factual situation presented by the evidence and the admissions of the parties.

V.

Based upon the admissions of the parties and the evidence adduced at the pre-trial conference, the defendant is entitled to the following findings of fact (in addition to those proposed by the plaintiffs and to which no objection has been made):

1. That at and prior to the issuance of said policy of insurance, and as an inducement to the defendant to issue the same, the plaintiffs represented and warranted to the defendant:

(a) That the automobile for which such insurance was desired was of the year model 1947 and had been actually manufactured that year;

(b) That plaintiffs had purchased said automobile in September, 1947 and that said automobile was a new car when they had so purchased it;

(c) That plaintiffs had paid the sum of $5,420.00 for such automobile;

(d) That plaintiffs were the sole and unconditional owners of said automobile, had good title thereto, and were lawfully in the possession of and entitled to the use of said automobile.

2. Defendant believed such representations and

warranties, and each thereof, and relied upon them and relied upon each thereof, and issued said policy of insurance induced by and believing and relying upon said representations and warranties, and each thereof.

3. Each and all of said representations and warranties so made by the plaintiffs to the defendant was false and fraudulent, and said plaintiffs, and each of them, knew at the time said representations and warranties were so made that they were fraudulent and untrue.

4. Each and all of said false and fraudulent representations and warranties were made by the plaintiffs with the design and purpose of deceiving and defrauding the defendant and of obtaining a contract of insurance to which the plaintiffs were not entitled.

5. Said automobile was not of the year 1947 and had not actually been manufactured that year, but was of the year model 1946 and had been manufactured that year, and these facts were known to the plaintiffs at the time of their false representations and warranties aforesaid.

6. Said automobile had not been purchased by the plaintiffs in September, 1947 and it was not a new car when they took possession of it, but the plaintiffs acquired the possession of said car after it had been owned, operated and used by sundry persons, and the plaintiffs had acquired the possession of said car from one Marcioni, who was not

the owner of said automobile, and these facts were known to the plaintiffs at the time of their false representations aforesaid.

7. Plaintiffs were not the sole owners of said automobile or the unconditional owners of said automobile, and they did not have good, or any, title thereto and they were not, nor was either of them, lawfully in the possession of said automobile or entitled to the use thereof, and these facts were known to the plaintiffs at the time of their false representations and warranties aforesaid.

8. When said policy of insurance was so applied for by the plaintiffs and issued by the defendant, there was a chattel mortgage lien upon said motor vehicle in favor of the Exchange National Bank, Chicago, Illinois and this fact was by the plaintiffs willfully concealed and withheld from the knowledge of the defendant.

9. When said policy of insurance was so applied for by the plaintiffs and issued by the defendant, plaintiffs well knew they had acquired the possession of said car within the State of Illinois, that said car was then registered within the State of Illinois, and that the plaintiffs did not surrender to the Motor Vehicle Division of the Arizona State Highway Department the number plates assigned to such vehicle in Illinois, nor did they surrender the Illinois registration card or the Illinois certificate of title, nor did they furnish any evidence of ownership or right to possession in the plaintiffs, but the said plaintiffs did remove certain Arizona license plates from another motor vehicle and did place

the same upon the automobile described in the policy of insurance here sued upon and did operate and drive said automobile within the State of Arizona with said license number plates affixed thereto that had been by plaintiffs removed from such other motor vehicle, and the plaintiffs willfully concealed each and all of such facts from the defendant.

VI.

Based upon the admissions of the parties and the evidence adduced at the pre-trial conference, the court should conclude as a matter of law that the policy of insurance sued upon is void ab initio, because of the false and fraudulent representations and concealment of and by the plaintiffs.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for Defendant,
By /s/ ALLAN K. PERRY.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 24, 1949.

[Title of District Court and Cause.]

CIVIL DOCKET

1949

Dec. 6—Enter judgment for the plaintiffs Louis P. Lutfy and Bertha A. Lutfy, husband and wife against defendant The London Assurance, a corporation in the sum of $5,420.00.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR NEW TRIAL

The defendant moves the court to vacate the judgment rendered December 6, 1949 in the above numbered and entitled action and to grant a new trial of said cause, for the following reasons and upon the following grounds:

I.

Such judgment is not justified by, or supported by, and is contrary to:

(a) The admissions of the parties; and

(b) The evidence received at the pre-trial conference.

II.

Such judgment is not justified by, or supported by, and is contrary to the matters determined at such pre-trial conference and the "Order on Pre-trial Conference" heretofore entered herein.

III.

Such judgment is contrary to the law applicable to the factual situation established.

IV.

For all of the reasons set forth in the "Defendant's Objections to Findings of Fact and Conclusions of Law Proposed by Plaintiffs," filed herein

October 22, 1949, which is hereby referred to and made a part of this motion for new trial.

KRAMER, MORRISON,
ROCHE & PERRY,
By /s/ ALLAN K. PERRY.
Attorneys for Defendant.

[Endorsed]: Filed Dec. 6, 1949.

In the United States District Court
for the District of Arizona

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 14, 1949

It Is Ordered that the Defendant's Motion for New Trial be and it is denied.

(Docketed December 14, 1949.)

[Title of District Court and Cause.]

DEFENDANT'S NOTICE OF APPEAL

Notice Is Hereby Given that the defendant above named hereby appeals to the United States Court

of Appeals for the Ninth Circuit, from the judgment of the United States District Court for the District of Arizona rendered and entered December 6, 1949 and from the whole of said judgment, and from the order of said District Court entered December 14, 1949 denying the defendant's motion for new trial.

KRAMER, MORRISON,
ROCHE & PERRY,
By /s/ ALLAN K. PERRY.
Attorneys for Defendant,

[Endorsed]: Filed Dec. 22, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men By These Presents:

That The London Assurance, a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, as principal obligor, the Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to become and be sole surety upon bonds required in the courts of the United States, as surety, are held and firmly bound unto Louis P. Lutfy and Bertha A. Lutfy in the penal sum of Six Thousand Five Hundred Dollars, for the pay-

ment of which said sum well and truly to be made said principal and surety bind themselves, and their respective successors, jointly and severally, firmly by these presents.

The condition of this obligation is such that,

Whereas, under date of December 6, 1949, a judgment was rendered and entered in the above numbered and entitled action in favor of the plaintiffs therein, the obligees in this bond, and against the defendant, the principal obligor hereon, wherein and whereby it was ordered, adjudged and decreed that said plaintiffs do have and recover of and from said defendant the principal sum of five thousand four hundred twenty dollars, with interest thereon at the rate of six per cent (6%) per annum from the date of said judgment, and for plaintiffs' costs, and thereafter and on the 14th day of December, 1949 an order was entered in said court and cause, denying said plaintiffs' motion for new trial and the principal obligor hereon is appealing to the United States Court of Appeals for the Ninth Circuit from said judgment and order, and desires to stay the execution of said judgment, pending such appeal.

Therefore, if said principal obligor shall satisfy said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modifications of the judgment and such costs, interests and damages as the appellate court may adjudge and award, then this obliga-

tion shall be void, otherwise to remain in full force, effect and virtue.

Witness the corporate name of the principal obligor, by its duly authorized general agent, and the corporate name and seal of the surety, by its duly authorized attorney-in-fact, this 21st day of December, 1949.

THE LONDON ASSURANCE,

By /s/ J. A. WAMSLEY,
General Agent.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By /s/ C. A. DRUMMOND,
Its Attorney-in-Fact.

Approved December 22, 1949.

/s/ DAVE W. LING,
U. S. District Judge.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss:

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the

records, papers and files in the case of Louis P. Lutfy and Bertha A. Lutfy, husband and wife, Plaintiffs, vs. The London Assurance, a corporation, Defendant, numbered Civ-1173 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute and civil docket entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute and civil docket entries, constitute the entire record in said case, as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

1. Transcript on Removal, filed May 7, 1948;
2. Notice of filing transcript on removal, filed May 11, 1948;
3. Answer, filed May 11, 1948;
4. Tender, filed May 14, 1948;
5. Motion to Set for Trial, filed October 13, 1948;
6. Minute entry of October 25, 1948 (Order setting case for trial)
7. Defendant's Motion for Leave to Amend its Answer, filed February 5, 1949;
8. Minute entry of February 7, 1949 (pre-trial conference and order granting motion for leave to amend answer, and vacating trial setting)

9. Amended Answer, filed February 8, 1949;

10. Minute entry of February 10, 1949 (further pre-trial conference)

11. Plaintiffs' Exhibit A in evidence (insurance policy), filed February 7, 1949;

12. Defendant's Exhibit 1 in evidence (depositions of Dr. Louis P. Lutfy and Bertha A. Lutfy), filed February 10, 1949;

13. Defendant's Exhibit 2 in evidence (transcript of record from the Secretary of State of the State of Illinois), filed February 10, 1949;

14. Defendant's Exhibit 3 in evidence (transcript of record from office of Motor Vehicle Commissioner of the State of Florida), filed February 10, 1949;

15. Order on Pre-Trial Conference, filed February 10, 1949;

16. Minute entry of February 15, 1949 (Order granting Plaintiff's motion for judgment)

17. Memorandum of Decision, filed February 25, 1949;

18. Defendant's Motion for New Trial, filed February 28, 1949;

19. Minute entry of March 21, 1949 (Hearing on and submission of motion for new trial);

20. Minute entry of April 12, 1949 (Order vacating judgment);

21. Defendant's Objections to Findings of Fact and Conclusions of Law Proposed by Plaintiffs, filed October 24, 1949;

22. Minute entry of December 6, 1949 (Hearing on Proposed Findings of Fact and Conclusions of

Law, order approving same and order directing entry of judgment.

23. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, filed October 21, 1949 and (being the same as) Findings of Fact and Conclusions of Law signed by the Court and filed December 6, 1949;

24. Clerk's Civil Docket entry of December 6, 1949, the same being the Clerk's notation of the judgment in the civil docket pursuant to order of December 6, 1949, and Rules 58 and 79 (a).

25. Defendant's Motion for New Trial, filed December 6, 1949.

26. Minute entry of December 14, 1949 (Order Denying Motion for New Trial) docketed December 14, 1949.

27. Defendant's Notice of Appeal, filed December 22, 1949.

28. Supersedeas Bond On Appeal, filed December 22, 1949.

29. Designation Of Contents Of Record On Appeal, filed December 22, 1949.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of $3.20 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 12th day of January, 1950.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 12454. United States Court of Appeals for the Ninth Circuit. The London Assurance, a corporation, Appellant, vs. Louis P. Lutfy and Bertha A. Lutfy, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed January 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12454

THE LONDON ASSURANCE, a corporation,
Appellant,

vs.

LOUIS P. LUTFY, et ux,
Appellees.

CONCISE STATEMENT OF THE POINTS ON WHICH DEFENDANT-APPELLANT INTENDS TO RELY ON APPEAL

Comes now the Defendant-Appellant herein, The London Assurance, a corporation, and makes the following Concise Statement of the points upon

which it intends to rely for an Appeal to the United States Circuit Court of Appeals from the final judgment made in the above entitled cause:

1. Such judgment is not justified by, or supported by, and is contrary to: (a) The admissions of the parties; and (b) The evidence received at the pre-trial conference.

2. Such judgment is not justified by, or supported by, and is contrary to the matters determined at such pre-trial conference and the "Order on Pre-trial Conference" heretofore entered herein.

3. Such judgment is contrary to the law applicable to the factual situation established.

4. There is no evidence or admission to support that portion of the judgment awarding the plaintiffs "$77.00 for equipment carried in the automobile."

5. There is no evidence or admission to support that portion of the judgment awarding the plaintiffs "$150.00 for reasonable expenses incurred by the plaintiffs after the theft."

6. There is neither evidence, admission nor law, to support the award of "interest at the rate of 6% per annum from the 28th day of November, 1947, until paid."

7. That the judgment is contrary to the evidence in that the admissions and evidence received at the pre-trial conference show that plaintiffs made representations and warranties of material facts relied upon by defendant, and each and all of said representations and warranties were false and fraudulent and were made for the purpose of deceiving and

defrauding the defendant and obtaining a policy and contract of insurance to which plaintiffs were not entitled.

8. That the judgment is contrary to the evidence in that the said automobile was not of the year model 1947 as represented and such fact was known to the plaintiffs at the time of their false representations and warranties, and such representation was of a material fact and thereby voided the insurance policy.

9. That judgment is contrary to the evidence in that the evidence shows that the plaintiffs were not the sole owners of the automobile, nor were they the unconditional owners of the said automobile, and that they did not have good or clear title thereto, and that these facts were known to the plaintiffs at the time of their false representations and warranties made to the defendant.

10. That the judgment is contrary to the evidence in that the evidence and admissions shows that plaintiffs concealed material facts from defendant at the time of the issuance of said policy.

11. That the judgment is contrary to the evidence in that the evidence shows that the plaintiffs concealed from the defendant, at the time the policy of insurance was issued, that the said automobile was then registered within the State of Illinois and that the plaintiffs did not surrender to the Motor Vehicle Division of the State of Arizona Highway Department the number plates assigned to such vehicle in Illinois, nor did they surrender the Illinois

registration card nor the Illinois Certificate of Title, nor did they furnish any evidence of ownership or right of possession in the plaintiffs.

12. That the judgment is contrary to the evidence in that at the time the said policy of insurance was applied for, the evidence shows that the plaintiffs concealed from the defendant the fact that they intended to and did remove certain Arizona License Plates from another vehicle registered in the State of Arizona and did thereafter place the said Arizona License Plates upon the car described in the insurance policy, and thereafter did operate and drive said car within the State of Arizona with the false license plates taken from the other motor vehicle affixed to the motor vehicle described in said insurance policy, and wilfully concealed all of said material facts from the defendant.

13. That the judgment is contrary to the evidence in that there is no evidence that the automobile was stolen from the plaintiffs.

14. That the judgment is contrary to the evidence and law in that there is no evidence or admissions that the plaintiffs had any insurable interest in the automobile at the time of the issuance of the policy or thereafter.

15. That the Judgment is contrary to the evidence and law in that the evidence and admissions shows that the title to the said automobile was in a third party at the time of the issuance of the insurance policy and at the time of the alleged theft and never was in the plaintiffs or either of them.

16. That the judgment is contrary to the evidence and the law in that the evidence shows that the plaintiffs failed to perfect their title to said automobile and failed to execute and deliver instruments and papers to the defendant after loss, defeating the company's right of subrogation to recover against other persons as provided in the said policy of insurance.

17. That judgment is contrary to the evidence and the law in that the evidence shows that when the policy of insurance was applied for by the plaintiffs and issued by the defendant, there was a Chattel Mortgage Lien upon said motor vehicle in favor of the Exchange National Bank, Chicago, Illinois. That this material fact was by the plaintiffs wilfully concealed and withheld from the knowledge of the defendant.

18. That the Court erred in granting the plaintiffs' Motion for Judgment in their favor on the basis of the pre-trial order.

19. That the Court erred in not granting the defendant's Motion for Judgment in its favor on the basis of the pre-trial order.

Dated: January 24, 1950.

/s/ WILLIAM A. WHITE,
/s/ EDWARD A. BARRY,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 24, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Notice is hereby given to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit that the following items selected from the certification of the Clerk of the District Court as the record on appeal are selected as that portion of the record, proceedings and evidence to be relied upon by Appellant as the Contents of Record on Appeal:

1. Transcript on Removal, filed May 7, 1948.
9. Amended Answer, filed February 8, 1949.
10. Minute Entry of February 10, 1949 (further pre-trial conference).
11. Plaintiffs' Exhibit "A" in Evidence (Insurance Policy), filed February 7, 1949.
12. Defendant's Exhibit 1 in Evidence (Deposition of Dr. Louis P. Lutfy and Bertha A. Lutfy), filed February 10, 1949.
13. Defendant's Exhibit 2 in Evidence (Transcript of record from Secretary of State of the State of Illinois), filed February 10, 1949.
14. Defendant's Exhibit 3 in Evidence (Transcript of record from Office of Motor Vehicle Commissioner of the State of Florida), filed February 10, 1949.
17. Memorandum of Decision, filed February 25, 1949.
20. Minute Entry, April 12, 1949 (Order vacating judgment).
21. Defendant's objections of findings of fact

and conclusions of law proposed by plaintiffs, filed October 24, 1949.

22. Minute Entry of December 6, 1949 (Hearing on Proposed Findings of Fact and Conclusions of Law, Order approving same, and Order Directing Entry of Judgment).

23. Plaintiffs' proposed Findings of Fact and Conclusions of Law, filed October 21, 1949, and (being the same as) Findings of Fact and Conclusions of Law signed by Court and filed December 6, 1949.

24. Clerk's Civil Entry of December 6, 1949, the same being the Clerk's notation of the judgment in the Civil Docket pursuant to Order of December 6, 1949, and Rule 58 and 79(a).

25. Defendant's Motion for New Trial, filed December 6, 1949.

26. Minute Entry of December 14, 1949 (Order Denying Motion for New Trial, docketed December 14, 1949).

27. Defendant's Notice of Appeal, filed December 22, 1949.

28. Supersedeas bond on appeal, filed December 22, 1949.

15. Order on Pre-Trial Conference, filed February 10, 1949.

Dated: January 24, 1950.

/s/ WILLIAM A. WHITE,
/s/ EDWARD A. BARRY,
Attorneys for Appellant.

No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE, a corporation,
Appellant,

vs.

LOUIS P. LUTFY and BERTHA A. LUTFY, husband and wife,
Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLANT'S OPENING BRIEF.

WILLIAM A. WHITE,
EDWARD A. BARRY,
391 Sutter Street, San Francisco 8, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE, a corporation,
Appellant,

vs.

LOUIS P. LUTFY and BERTHA A. LUTFY, husband and wife,
Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

Plaintiffs and appellees commenced an action on an insurance policy insuring against loss of an automobile by theft, against defendant and appellant in the Superior Court of the State of Arizona in and for the County of Maricopa (page 2, T.R.) on March 25, 1948.

The case was thereafter transferred to the United States District Court for the District of Arizona (pages 15, 16, T.R.).

Issue was joined by the filing of an amended answer by defendant insurance company (pages 18-24, T.R.).

A pre-trial conference was had on February 7, 1949, and February 10, 1949 (page 90, T.R.), and a memorandum of decision was made on February 25, 1949.

A minute order was made on April 12, 1949, setting aside the judgment on the grounds the issues were not settled by admissions or the pre-trial conference (page 95, T.R.).

The Court thereafter reconsidered the matter, including all the exhibits: Plaintiffs' A and Defendant's 1, 2 and 3, and on December 6, 1949, signed plaintiffs' proposed findings of fact and conclusions of law (pages 96-98, T.R.) and thereafter ordered judgment for plaintiffs in the sum of $5,420.00.

Defendant made the motion for new trial on December 6, 1949, which was denied on December 14, 1949. Defendant and appellant gave notice of appeal on December 22, 1949 (pages 105-106, T.R.), and filed a Supersedeas Bond on appeal on the same day (pages 106, 107 and 108, T.R.).

On January 16, 1950, the Clerk's Certificate record on appeal was filed in the Clerk's office of Circuit Court (pages 108-112, T.R.).

On January 24, 1950, appellant filed in the office of the Clerk of the Circuit Court its Concise Statement of Points on which it intends to rely (pages 112-116, T.R.) and its Designation of Record (page 117, T.R.).

ADMISSIONS ON PRE-TRIAL CONFERENCE.

1. That plaintiffs and appellees are residents in the State of Arizona.

2. That defendant and appellant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

3. That the subject matter exceeds the sum of Three Thousand Dollars ($3,000.00).

4. That appellant issued its insurance policy No. 148323 insuring appellees against loss by theft of a 1947 Lincoln Continental Convertible Coupe, which policy is a part of the record on appeal (pages 25-36, T.R.).

5. That the automobile described in the policy was a 1946 model and was manufactured in that year. It had an actual cash value of Five Thousand Four Hundred Twenty Dollars ($5,420.00).

STATEMENT OF FACTS.

In September of 1947 appellees, a doctor and his wife, of Phoenix, Arizona, desired to buy a new Lincoln automobile. Certain used car dealers in Phoenix advised them that through another car dealer, Consolidated Motors, in Tuscon, a new Lincoln Continental could be purchased in Chicago, Illinois. Mrs. Lutfy, the wife, flew to Chicago where she met a man named Marciano, who took her to see the car and then went to a bank in Chicago.

After giving a check in the sum of Five Thousand Six Hundred Dollars ($5,600.00) to the bank, she received some documents purporting to be a "title" to the automobile. She left the bank with Marciano and the supposed seller and went back to the place where she had seen the automobile. She then gave Marciano the Arizona license plates which she had taken off a Buick automobile which the appellees owned, and gave Marciano the documents, requesting him to have the title of the car transferred to the appellees' names. On September 19, 1947, she phoned her husband, Dr. Lutfy, from Chicago that she had purchased a new car and requested that he obtain insurance on it. On the same day, Dr. Lutfy phoned his insurance agent and gave him the year number, motor number, serial number and the cost, telling him it was a 1947 model, and that the car was new. He asked him to issue an insurance policy, which policy was issued (pages 25-36, T.R.).

Thereafter, Mrs. Lutfy drove the car from Chicago, Illinois, to Phoenix, Arizona, with the Arizona license plates on it. Thereafter, appellee, Dr. Lutfy, drove it until October 28, 1947, when it disappeared from outside his office in Phoenix, Arizona, still having the Arizona license plates on it.

Subsequently, the F.B.I. discovered the car in Florida and obtained all the registration certificates and certificates of title on the automobile from the State of Illinois and the State of Florida (pages 69-89, T.R.), none of which showed any transfer to the appellees or either of them.

LEGAL QUESTIONS INVOLVED.

I.

May Plaintiffs and Appellees Recover on an Insurance Policy When They Were Not the Sole and Unconditional Owners of the Automobile:

1. Did not have clear title;
2. Title was in a third party;
3. Plaintiffs had no insurable interest in automobile?

II.

Did Plaintiffs and Appellees Make Misrepresentations of Material Facts Which Voided Policy:

1. Stating it was a new car;
2. Stating it was a 1947 model;
3. Stating there was no lien or encumbrance on it?

III.

Did Plaintiffs and Appellees Conceal Material Facts Which Voided Policy:

1. Not new car;
2. Lien on car;
3. Method of purchase of car;
4. Placing of Arizona license plates on car?

IV.

Did Plaintiffs Breach Insurance Policy by Inability to Grant Appellant Subrogation Rights:

1. Could not execute and deliver instruments of title to appellant?

ARGUMENT.

I.

THE CONTRACT BETWEEN THE PARTIES HEREIN IS THE INSURANCE POLICY ISSUED (PAGES 25-30, T.R.).

It provides in part:

> "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as herein stated: No exceptions."

If the plaintiffs did not own the automobile, then they cannot recover under the policy.

> "The burden was upon the plaintiff to establish his insurable interest in the property described in the policy, and that burden required that he establish the interest which was defined in the policy. The recital of ownership is a valid provision and by the very terms of the policy the insurance was void if the insured was other than the unconditional and sole owner. This the evidence failed to establish." (30 A.L.R. 661).

As shown by the facts, all appellees acquired was possession of the car in question. The documentary evidence (Defendant's Exhibits 2 and 3, pages 69-89, T.R.), definitely shows that appellees never acquired title to the car.

In fact, appellees neither alleged nor proved ownership of the car in question (pages 1-5, T.R.).

Examine the defendant's Exhibits 2 and 3 closely and compare them with the story of appellees (pages 36-69, T.R.).

The documents definitely show that Don E. Jordan was the owner (page 76, T.R.) by the original Bill of Sale and the Certificate of Title issued therefor.

They also show that the Certificate of Title was surrendered on October 24, 1947 (page 77, T.R.), and an Assignment of Title made on October 22, 1947, to Henry Green (page 78, T.R.) and a new Certificate of Title issued to him on October 24, 1947 (pages 81, 82, T.R.).

It is also quite significant that on the day Mrs. Lutfy, an appellee, claims that she bought the automobile, September 19, 1947, the car was mortgaged to the Exchange National Bank (pages 71, 73, T.R.), and said lien was not released until October 16, 1947 (page 71, T.R.).

It is hard to believe that a large Chicago Bank would be a party to a fraud or that its records would not truthfully record the true facts of a business transaction. If Mrs. Lutfy was in that Bank on September 19, 1947, and if she paid the Bank and Don E. Jordan Five Thousand Four Hundred Twenty Dollars ($5,420.00), why did she not receive the original Certificate of Title from the Bank with its stamp on it, showing that its lien was paid? Everyone knows that in borrowing money from a Bank with a car used as Security, the Certificate of Title is held by the Bank until its lien is paid off.

Was Mrs. Lutfy in that Bank? Did Mrs. Lutfy receive any Certificate of Title? She claims she signed her name where the purchaser should sign (page 61,

T.R.). It is significant that such place is blank on the Certificate of Title on which the Bank released its lien (page 71, T.R.).

It is also significant that if Mrs. Lutfy had any Certificate of Title for this car in her hands, she failed to notice: (1) That it was a 1946 Model (pages 69, 70 T.R.); and (2) That it was purchased on January 8, 1947 (page 70, T.R.), and was, therefore, not a new car.

The following statements in Defendant's Exhibits 2 and 3 (pages 69-89, T.R.) are set forth herein for emphasis:

> (Page 83, T.R.): "A title application should accompany this application if an Illinois title has not been issued in your name for this vehicle. If new car purchased dealer must execute Bill of Sale on back of your title application. If used car purchased send assigned title with these applications."
>
> (Page 81, T.R.): "If application is for registration of a New car purchased from a dealer for which a Certificate of Title has not previously been issued, Dealer must complete bill of sale form at bottom of application. (Sec. 4(b).)"
>
> (Page 75, T.R.): "Certificate of Title must be assigned and delivered to purchaser.
>
> The Motor Vehicle Anti-Theft Act, approved May 11, 1933, provides that the Secretary of State shall not after January 1, 1934, register or renew a registration of any motor vehicle, unless and until the owner shall make application for and be granted a Certificate of Title. (Sec. 3 (a).)"

(Page 74, T.R.): "Before accepting an assigned title, liens on face of title must be stamped paid and signed by lien holder or an authorized official."

"Any changes, erasures, mutilations, ink eradications upon Bill of Sale, Certificate of Title, Certificate of Origin voids assignment and will not be accepted."

(Page 77, T.R.): "Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations."

How could appellee have had a Certificate of Title or any document regarding a motor vehicle registered in the State of Illinois and not seen at least one of the above statements?

If it were a new car, she should have an original Bill of Sale executed by a dealer. If it had a lien on it, she should have had the Bank mark the lien paid.

If she could read, she should have seen the year model, the original date of sale and the lien.

The only conclusion that can be drawn from these facts is that she paid her money to a thief who could not pass title to the car to her.

46 *Am. Jur.* 622: "In pursuance of the general rule that a person cannot transfer a better title to a chattel than he himself has, one who has acquired possession of property by a crime such as theft cannot confer title by a sale even to a bona fide purchaser."

46 *Am. Jur.* 623: "As to transfers and encumbrances of interests in personal property gen-

erally, it is a general rule that the fact that the owner has intrusted someone with mere possession and control of personal property is not sufficient to estop the real owner from asserting his title against a person who has dealt with the one in possession on the faith of his apparent ownership or apparent authority to sell * * *"

The documentary evidence shows the appellees had no title. All the evidence shows that appellees had no insurable interest in the car.

Hessen v. Iowa Automobile Mutual Ins. Co., 195 Iowa 141, 190 N. W. 150:

"Whatever interest plaintiff had in the insured property must have been derived under his contract of purchase. His vendor is not shown to have had anything more than the possession of a stolen car. Through his purchase plaintiff acquired no title and clearly never had such ownership as was required and defined by the terms of the policy * * *"

An insurance company does not insure a possessory interest and particularly one based on such duplicity that existed herein (30 A.L.R. 661).

II.

DID APPELLEES MAKE MISREPRESENTATIONS OF MATERIAL FACTS WHICH VOIDED POLICY?

One of the clauses of the policy reads as follows:

> (Page 35, T.R.): "This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof * * *"

There is no question but what appellees made misrepresentations as follows:

1. It was a new car (page 39, T.R.).

2. That it was a 1947 model (page 38, T.R.).

3. That it had no lien or encumbrance on it (page 39, T.R.).

Appellees ratified those representations when they accepted the policy (pages 25-30, T.R.) with the declarations to the same effect in the policy. For emphasis we quote another portion of the policy:

> (Page 35, T.R.): "16. Declarations. By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations * * *"

There is no question that the policy calls for voidance of the policy because of these representations (see supra).

The only question remaining is whether those misrepresentations were with regard to "material facts".

What is a material fact in this instance? The matter of materiality is codified in the California Insurance Code as follows:

> "Sec. 334. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

The textwriter in 29 *Am. Jur.* at page 424 states the rule:

> "The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium. * * *"

It is also stated in 149 A.L.R., page 531, as follows:

> "In cases involving policies insuring owners of motor vehicles against loss by reason of fire or theft, statements as to the year of manufacture or model of the motor vehicle to be insured are generally held to be representations of material facts, the falsity of which will avoid the risk."

If the Court will for a moment look back to the year 1946, it will be recalled that this was the period

of reconversion from war to peace. That during this period great demand was being made for automobiles. That each and every model was in great demand and the highest priced cars were still under price controls. The demand far exceeded the available models. There followed during this period a lucrative business which, because of the nature of the market, thrived. New cars were sold at illegal premiums. Used cars brought fabulous prices. Insurance companies were accustomed to having all kinds of frauds worked upon them. Because of this and because of the condition of the times, suspicion was developed when in the year 1947 a car manufactured in 1946 was sold as new. Immediately a question was presented. Was this a new car? Was it a car that was in the hands of illegal dealers? Why was it never sold before? What was its condition? Were the purchasers people of good character? Were they proper risks? Should the car be insured? These are just a few of the doubts raised by the simple fact that a 1946 car was sold for new in 1947.

Had the company been told of the year model, an investigation would have been required. A part of such check would have been a search of the title of ownership.

So, when we first look at the facts, what seemed an unimportant warranty as to year, now has great significance.

It was material for an underwriter to know if the car was a new or used car. If it was a used car, he might be put on inquiry as to who was former owner,

what was the condition of it, had it been in a previous wreck, and numerous other questions not necessary or material to ask if the car insured was new.

In the case of *Strangio v. Consolidated Indemnity Ins. Co.,* 66 F. (2d) 330, at page 333, the Court said:

> "In *Stipcich v. Met. Life Insurance Co.,* 277 U.S. 311, 316-318, 48 S.Ct. 512, 513, 72 L. Ed. 895, Mr. Justice Stone said: 'Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option." (Cases Cited).
>
> Page 333: "If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing, would seem to require him to make a full disclosure. If he fails to do so, the company may despite its acceptance of the application decline to issue a policy (citing cases), or if a policy has been issued, it has a valid defense to a suit upon it." (Cases).

See also:

> *Gates v. General Casualty Co. of America,* 120 F. (2d) 925.

In the case of *Palmquist v. Standard Accident Ins. Co.,* 3 F. Supp. 356, at page 358, the Court said:

> "The determination of the materiality of a representation is a question of law for the Court, and it has been held error to submit to the jury the materiality of a false answer given by the insured with reference to his occupation." (14 *Cal. Jur.* 49).

"* * * It seems to be generally agreed that the parties themselves, having asked and answered questions, must be held to have agreed that the question was material."

Was the fact that the car had a lien on it material?

The contract has provisions with regard to that:

(Page 26, T.R.): "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as herein stated: No exceptions."

(Page 27, T.R.): "Purchased Month 9, Year 1947, New, Encumbrance None."

(Page 30, T.R.): "Exclusions. This policy does not apply: * * *

(b) Under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;"

The very fact that the question of a lien is raised in the policy in three different places should be sufficient to show that it is a very material fact. A borrower may not be as good a risk as a cash buyer. The insurance company should have the benefit of that requested information.

But the main point regarding the materiality of those representations is that if the true facts had been told, the type of inquiry and the determination as to the probabilities of accepting the risk would be different.

And that the defendant was misled will be seen from our argument under the next heading of Concealment.

III.

DID PLAINTIFFS AND APPELLEES CONCEAL MATERIAL FACTS WHICH VOIDED POLICY?

Under this heading all of the matters and law cited under the previous heading apply.

Gates v. General Cas. Co. of America (1941) 120 F. (2d) 925:

> "The finding that concealment by the insured was fraudulently made is surplusage, since a concealment, whether intentional or unintentional, of fact material to the risk vitiates an insurance policy."

In addition, however, we have the additional points of concealment of the method of purchase and the placing of Arizona license plates on the car in question.

Any analysis of the method of purchase from its inception would cause suspicion if known by an insurance company. Before leaving for Chicago, Mrs. Lutfy was given the name of a man, Marciano, and a phone number to call him. She was told to take the Arizona license plates from a Buick car, to take them back to Illinois and put them on the purchased car. The "new" car was to cost Five Thousand Nine Hundred Dollars ($5,900.00) (page 42, T.R.), but when she arrived, Mrs. Lutfy "made a deal" (page 55, T.R.) whereby, first, it would only cost her Five Thousand

Six Hundred Dollars ($5,600.00) (page 45, T.R.), which was then reduced to Five Thousand Four Hundred Twenty Dollars ($5,420.00), because of some white-wall tire transaction (page 55, T.R.).

If those two facts were not enough to arouse her suspicion entirely, the fact that the car was registered in Illinois in an individual name (page 66, T.R.) and also that she had to go to a bank to buy this "new" car should have put her on her guard. But apparently not, and she did not think enough about it to tell her insurance agent or company any of these facts regarding the purchase or the registration in Illinois in an individual's name rather than in a dealer's name.

The textwriter in 29 *Am. Jur.* § 540, at page 436 states:

> "Contracts of insurance have been deemed, broadly speaking, to be contracts uberrimae fidei, that is, of the utmost good faith, and the applicant for insurance is bound to deal fairly with the insurer in the disclosure of facts material to the risk. * * *"

The same writer, at page 438, 29 *Am. Jur.* states:

> "The insured may not withhold information of such unusual and extraordinary circumstances of peril to the property as could not, with reasonable diligence, be discovered by the insurer or reasonably anticipated by it as a foundation for specific inquiries."

Attention should be called to the fact that these representations were made over the telephone to the in-

surance agent (page 38, line 2, T.R.). There was not much opportunity to make inquiry in such a phone conversation. Also the concealments involved transactions occurring over 2,000 miles away in Chicago, Illinois. While the plan to attach the Arizona license plates to the car was conceived in Arizona, the actual transaction took place in Illinois. All the other phases of concealment of material matters, such as the bank transaction, the fact of the Illinois registration and the signing of the "title", occurred in Chicago, where the defendant would not have any opportunity of inquiry unless the facts had been revealed.

When the facts are disclosed by a mere examination of the Certificate of Title, it is manifest what the defendant-appellant could have ascertained regarding the car if the above facts had not been concealed.

Appellees were not without some knowledge regarding the situation, as shown when questioned about new Arizona license plates and getting the Certificate of Title.

> (Page 48, T.R.): "A. No, I never did receive the certificate of title.
>
> Q. Did you ever make an application to the Arizona Motor Vehicle Department for a certificate of title?
>
> A. No, because I would have to have this Illinois title before I could do that."

> (Page 60, T.R.): "Q. You made no application to obtain an Arizona certificate of title?
>
> A. No, sir."

(Page 64, T.R.): "Q. You don't remember whether you put any other——

A. We didn't put any other plates on it, no. I don't remember.

Q. And do you know why you didn't ask or apply for Arizona license plates?

A. Because we had to have the certificate of title."

It is difficult to believe that a reputable Illinois motor car dealer would assist in the duplicity of defrauding either the State of Illinois or the State of Arizona out of a license tax on a new motor vehicle, yet we have here a record of appellees taking Arizona license plates from an old Buick car in Arizona and taking them back to Chicago.

(Page 60, T.R.): "Q. How did you get the Arizona plates for it?

A. Well, I just took some Arizona plates.

Q. Some that you had had on another car?

A. Yes, off the Buick.

Q. That was the Buick that you folks had owned here?

A. That is right.

Q. And you took the plates off of them?

A. That is right.

Q. Took them back to put on this car there?

A. Yes.

Q. And drove it out with the Arizona plates on it?

A. Yes, sir. Mr. Marciano put them on for me."

And Mr. Marciano, the supposed dealer put them on.

Who is Mr. Marciano? Where did Mrs. Lutfy meet him? She had his phone number (page 54, T.R.)—REPUBLIC 10567—and she met him in front of the Du Pont Company (page 63, T.R.).

> (Page 63, T.R.): "Q. And you don't know where?
>
> A. It was in Chicago. I will tell you—it was in front of the Du Pont Company, Du Pont de Nemours, one of their offices that I gave him the title. That is one thing that I remember.
>
> Q. You had the car at that time?
>
> A. Yes, it was parked right in front.
>
> Q. How did you happen to meet Marciano there?
>
> A. Chadwick and Walden had given me one of their cards. It was a card with A. Marciano on it and his telephone number, Republic 10567."

Does that sound like a reputable auto dealer? Does that entire transaction sound like a bona fide purchase in the open market? Appellant submits that these facts and the law on the concealment point alone require judgment to be entered for appellant.

IV.

DID APPELLEES BREACH THE INSURANCE POLICY BY INABILITY TO GRANT APPELLANT SUBROGATION RIGHTS?

Appellees pleaded that they had performed all the conditions of the policy (Par. IV, page 4, T.R.). This was denied by appellant in its amended answer (Par. IV, page 19, T.R.).

One of the clauses and a condition of the policy is as follows (page 34, T.R.):

> "9. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organiaztion and the insured shall execute and deliver such instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing to prejudice such rights."

A reading of this clause together with the declarations in the policy regarding ownership will definitely establish the reason for requiring a clear title in the insured.

In case of a theft, the company attempts to find the car, and if a loss has been paid prior to recovery, it intends to be subrogated to the rights of the insured to make the recovery. In other words, the company, by contract, attempts to minimize its losses.

Appellees agreed to that clause. What happened here? The car was found, but appellees had no right of recovery, because they had no title. Title to the car was in Henry Green on October 27, 1947 (page 81, T.R.), and he transferred it to Henry Greenspon (page 82, T.R.), who in turn, transferred it to Paul G. Horvath (page 85, T.R.).

Appellees were unable to and did not "execute and deliver instruments and papers" to appellant. Nor did appellees do anything else toward recovery of the car or assisting appellant in perfecting their rights to recover the car.

(Pages 49-50, T.R.): "Q. Were you told by the Federal Bureau of Investigation who had the car and where it was?

A. Yes.

Q. And what did they tell you?

A. They stated that the car was sold in Miami, Florida, at an auction to a man by the name of G. Horvath, 368 Northeast 52d Street, Miami, Florida.

Q. Have you made any effort to repossess the car from that man?

A. No.

Q. Why was that?

A. Because it was up to the Insurance Company to repossess it."

It must be apparent to anyone reading the facts of this transaction that appellees have, throughout, endeavored to take advantage of whoever and whatever situation developed. They attempted to defeat the Arizona dealers, who made the deal for them (pages 52, 54, 55, T.R.). They got Marciano to lower the price (page 55, T.R.), and they attempted to defeat the State of Illinois and the State of Arizona out of their license fees. Now, having been bilked by their method of transacting business out of their money which they paid for temporary possession of a car, they attempt to claim under a contract of insurance, which they failed to abide by themselves.

A review of the Defendant's Exhibits 2 and 3 will show their inability to recover the car. No right of action exists for them against Green, Greenspon or Horvath for the recovery of the car.

They might have a right of action against Marciano for their money, and possibly against Don E. Jordan, if they can prove that he is the man Mrs. Lutfy met in the Bank. That right of recovery would not be for the car,—it would be for money had and received, and the appellant did not insure them against that theft.

And appellees have failed to produce and are unable to give appellant any instruments or documents to effect recovery of the car, which they represented to appellant belonged to them as sole and unconditional owners. And thus, appellees have not performed all the conditions of the policy as they allege in Paragraph IV of their Complaint, and are unable to live up to the conditions of Clause 9 of the policy (page 35, T.R.).

That clause ends by saying: "The insured shall do nothing after loss to prejudice such rights." According to appellees, it reads: "The insured shall do nothing."

These subrogation rights are often valuable and tend to cut the loss paid out by the insurance company. But this valuable right depends entirely upon the insured. As was stated at page 1001, 29 Am. Jur.:

> "The insurer's right of subrogation against third persons causing the loss paid by the insurer to the insured does not rest upon any relation of contract or privity between the insurer and such third person, but arises out of the contract of insurance and is derived from the insured alone. Consequently, the insurer can take nothing by subrogation but the rights of the insured, and is subrogated to only such rights as the insured possessed."

CONCLUSION.

Appellant submits that all the facts and documents show that appellees neither alleged nor proved that they were at any time sole and unconditional owners of the car and thus have failed to sustain the burden of proof required of them. Appellant further submits that by the uncontradicted record, appellees misrepresented and concealed facts of material value which, according to the contract, voids the policy, and finally, by their failure to have the title they represented themselves as having, they have defeated any subrogation rights of appellant, which rights are a substantial part of the policy.

By reason thereof, judgment should be reversed and entered for defendant on its motion made at the pretrial conference.

Dated, San Francisco, California,
April 12, 1950.

Respectfully submitted,
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EDWARD A. BARRY,
Attorneys for Appellant.

No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE (a corporation),

Appellant,

vs.

LOUIS P. LUTFY and BERTHA A. LUTFY (husband and wife),

Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLEES' ANSWERING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLEES' ANSWERING BRIEF.

PRELIMINARY STATEMENT.

Our argument will be based solely on the record. The facts can not be disputed. Mrs. Lutfy went to Chicago, Illinois from Phoenix, Arizona, to purchase an automobile. On her arrival in Chicago she examined the automobile, was satisfied with its condition, and went to a bank in order to effect payment. She paid the full value of the car, incidentally discharging a lien, and received a certificate of title properly endorsed. She gave the certificate of title to one Marciano in order that Marciano might forward it to the

title department of the State of Illinois. Marciano proved unfaithful to his trust and did not forward the certificate to the title department.

We do not consider the statement "everyone knows" valid authority (Appellant's Opening Brief, page 7) for appellant's attempt to present the appellees as everything from black market operators to fraudulent claimants under an insurance policy.

In the argument it will be necessary to avoid confusion between the word "title" and *actual ownership.* As used throughout the appellant's brief "title" apparently refers to either one of two uses: first, to the title certificate, and, second, as a substitute for "owner" or "ownership".

LEGAL QUESTIONS INVOLVED.

I.

Appellant's question number I (Appellant's Opening Brief, page 5) postulates its answer by presupposing that plaintiffs were not the sole owners of the automobile insured.

The insured—plaintiffs in the lower Court—did not represent that they were the "sole and unconditional owners" of the automobile in question. They did tell the insurer that they were the "sole owners" of the automobile. (T.R., page 26.) There is nothing in the record which shows that the appellees were not the sole owners of the automobile. Appellant argues (T.R., page 5) that appellees did not have *clear title* to the

automobile, that *title* was in a third party and that therefore plaintiffs had no insurable interest in the automobile. It is true that as far as the record shows appellees never had a valid *certificate of title* in their name; that fact alone does not effect ownership.

Referring to the defendant's exhibits it appears that one D. E. Jordan, or Don E. Jordan, owned an automobile. (Defendant's Exhibit No. 2; T.R., pages 76-77.) In September, the appellees purchased and paid for the automobile insured by appellant on September 19th. The car was brought to Arizona. On October 18th a duplicate certificate of title was issued and assigned October 22 to Henry Green. (T.R., pages 77-78.) On October 28th the car was stolen from the appellees (T.R., page 48), and Green sold to Greenspon October 27. (T.R., page 84.)

The exhibits disclose that a certificate of title was given to the appellee and that appellee then returned the certificate of title to one Marciano who was, by mutual agreement, to forward the title to the Illinois title bureau. On the 16th day of October, 1947, while the insured car was in the possession of the appellees in Phoenix, Arizona, D. E. Jordan secured a duplicate title, stating in his application that he had at that time possession of the automobile. (T.R., pages 70-71.) The insured car was on that date in Phoenix, Arizona, in the possession of the appellees.

The exhibits all show—and it was necessarily so decided by the judge of the District Court—that the appellees were in fact the owners of the car insured by appellant, and had been the owners, and are still

the owners, of the car insured, although, as stated by the appellees, they do not have "a certificate of title" for the automobile.

We believe that the record demonstrates that the appellees were, and are, the owners of the automobile insured which was stolen from them. Whether or not appellees had a certificate of title is immaterial to the true ownership. The conclusion reached as to appellant's legal question Number 1 is incorrect.

Even though appellees have no written indicia of title they were in fact the owners of the automobile insured. If it be conceded, *arguendo,* that the appellees were not "sole" owners, the appellant is still liable on the policy. *Barnett v. London Assurance Co.,* 245 Pac. 3, 138 Wash. 673; *Savarese v. Hartford Fire Ins. Co.,* 123 Atl. 763, 99 N.J.L. 435. It may be noted that the car insured here was not a "stolen" car, but was, as far as the record shows, the property of D. E. Jordan who according to the record, gave a certificate of title to Marciano and left the car at Motor Sales Company to be sold.

II.

Appellant asks whether the appellees made representations of material facts which voided the policy.

1 and 2. There is no showing that the car insured and stolen from the appellees was not a new car and that it was not a 1947 model. However, whether it was, or was not, is immaterial. The Supreme Court of the State of Arizona has ruled upon these two points holding that it is necessary for the defendant (insurer) to

allege and prove that false representation was material. *North British & M. Ins. Co. v. San Francisco Secur. Corp.,* 249 Pac. 761, 30 Ariz. 599. It is appellees' contention that there was no concealment or misrepresentation of any material fact or circumstance concerning the policy or the automobile insured, nor does the policy make any of the matter within "declarations" a warranty. (T.R., page 35.)

As to the contention that there was a lien on the automobile insured, appellees insist that the trial Court properly held: (a) that there was no lien on the automobile insured, or (b) that the statement was not material. The record discloses that if there was a lien when the appellees purchased the automobile insured the lien was paid at that time and the record further discloses that the lien, if any, was paid at the latest on October 16, 1947, which was prior to the date of the theft of the automobile from the appellees.

The statement of defendant's counsel concerning this matter is included in defendant's Exhibit No. 1 at pages 65 and 66 of the Transcript of Record wherein counsel stated: "The reason I asked you, Mrs. Lutfy, the information we have is that there was a mortgage on the car to this Exchange National Bank and that a portion of the money that you paid to Jordan was used to pay for that lien. Did you know anything about that at all?"

It is obvious from the exhibits that the original certificate of title issued to D. E. Jordan did not carry the statement that there was a lien. The appellant's evidence, according to its counsel, shows that the

lien was paid at, or before, the time that the appellees became owners of the automobile insured—if there was a lien, and the first actual notation of the discharge of the lien is shown by the record as prior to the theft. Under the exclusion cited by appellees (Appellant's Opening Brief, page 15), there can be no ground for voiding the policy.

III.

Appellees' contention regarding the alleged concealment of material facts as to the representations (1 and 2) that is, that the car was not a new car and that there was a lien on the car, have been discussed. Under this heading the appellees further discuss the method of purchase of the car and the fact that Arizona license plates were placed on the car. The Transcript of Record fails to show that the placing of Arizona license plates on the car was in any way illegal, or unlawful. The general argument is directed to the bona fides of the appellees rather than a legal summation. Appellees will not engage in vituperation and innuendo *dehors* the record: The District Court considered the matter raised by the answer, and properly gave judgment to appellees.

IV.

The appellant asks whether the appellees breached the insurance policy by inability to grant appellant subrogation rights. Again, appellant draws conclusions from matter not before the Court and not in the record. The record does not show that the appellant at any time asked for subrogation rights; the record does show that the appellant flatly refused to pay for the

loss. The record does not disclose appellant made any attempt to recover the car in question or to secure any rights under the policy, and the record shows that the appellant never made any payment under the policy. The rights of subrogation according to the appellant's contract did not attach.

Appellant argues that the car was found but "appellees had no right of recovery because they had no title". (Appellant's Brief, page 21.) This is ridiculous. The appellees were the owners of the automobile and the burden was upon the appellant to proceed with recovery. The appellant states that:

> "Appellees were unable to and did not 'execute and deliver instruments and papers' to appellant. Nor did appellees do anything else toward recovery of the car or assisting appellant in perfecting their rights to recover the car."
>
> Appellant's Opening Brief, page 21.

The record does not show that any documents, instruments, or papers were ever asked of the appellees, The absurdity of the argument is shown by the statement in appellant's opening brief that:

> " * * * appellees have failed to produce and are unable to give appellant any instruments or documents to effect recovery of the car, which they represented to appellant belonged to them as sole and unconditional owners. And thus, appellees have not performed all the conditions of the policy as they allege in Paragraph IV of the Complaint, and are unable to live up to the conditions of Clause 9 of the policy. (T.R., page 35.)"
>
> Appellant's Opening Brief, page 23.

CONCLUSION.

Appellees, in the foregoing, have attempted to confine themselves to a discussion of the record before this Court. We submit that the judgment of the trial Court was correct and must be sustained.

Dated, Phoenix, Arizona,
May 8, 1950.

Respectfully submitted,
JAMES A. STRUCKMEYER,
Attorney for Appellees.

No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE (a corporation),

Appellant,

vs.

LOUIS P. LUTFY et ux.,

Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,454

IN THE

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Appeal from the United States District Court, District of Arizona.

APPELLANT'S CLOSING BRIEF.

STATEMENT IN REPLY.

Appellees in their preliminary statement infer that appellant went outside the record. It is appellant's belief that its statement of fact and statement of case are correct and any conclusions drawn by it were the correct conclusions from the evidence as shown in the record.

It is significant that appellees claim that appellant represents the appellees as "black market" operators. The use of the words "black market" does not appear in appellant's brief. We are willing to accept,

however, the conclusion drawn by appellees. The Court itself can determine from the record what kind of a market the appellees were using in this particular case.

It is appellant's claim that appellees neither had title nor actual ownership and regardless of the use of the word "title" in the opening brief, we desire it definitely understood that it is appellant's claim that appellees had neither "title" nor "ownership" to the automobile which they attempted to insure with appellant company.

ARGUMENT ON LEGAL QUESTIONS INVOLVED.

I.

APPELLEES NOT THE SOLE OWNERS OF CAR.

Under this heading appellants presented arguments and law to establish that appellees were not the owners of the automobile in question. On pages 2, 3 and 4 of their answering brief, appellees indulge in argument which they state is based upon the record. In that, there is admission that appellees never had a valid certificate of title in their name (Appellees' Answering Brief, page 3). This statement is difficult to reconcile with the statement on page 2 (A.A.B.) to the effect that there is nothing in the record which shows that appellees were not the "sole owners of the automobile". Without repeating the matters set forth on pages 6, 7 and 8 of appellant's opening brief, we respectfully submit that the record does *not* show that the appellees were the sole owners, but that, in

fact, shows that other people claim to own the car at the time the appellees also claim to own it.

In support of their claim that the company is liable, notwithstanding the claim of other parties, appellees cite two cases (page 4, A.A.B.). One is *Savarese v. Hartford Fire Ins. Co.,* 99 N.J.L. 435, 123 Atl. 763, which we refer to as the New Jersey case, and *Barnett v. London Assurance Co.,* 138 Wash. 673, 245 Pac. 3, which we will refer to as the Washington case. The New Jersey case is the earlier of the two. It, in effect, follows the *Norris* case, 123 Atlantic 761, which is also a New Jersey case.

In the New Jersey case, the insured had possession of the car for two years and the policy had been renewed once. At page 764 the Court stated:

> "* * * We think that 'sole ownership' as used in the policy can properly mean nothing more than that no one else is interested in the ownership of the car * * *."

Is that similar to the facts in this case? Appellees had temporary possession of the car for about thirty-nine (39) days. The record, as shown from defendant's Exhibits 2 and 3, definitely shows that other people were claiming an interest in the car and, in fact, others had possession of the car at the time the case went to trial. At page 764, the Court also stated:

> "According to the record, during two years of undisturbed possession of the car by plaintiff, and even at the time of the trial, no one came forward to claim an ownership interest in the automobile."

Clearly, that New Jersey case is not in point in the case at bar.

In the Washington case, the facts were that the automobile was not found, but another automobile with the same number on it was found in the State of Mississippi, but it was definitely shown that that was not the car covered in the insurance policy in question. In other words, in that case no one claimed to be the owner of the car covered by the policy other than the plaintiff, who was the insured. The car itself was not recovered. One of the claims of the company was that its subrogation rights were lost. In commenting on that, at page 4, the Court stated:

> "Its right to subrogation to the rights of the respondent with reference to the car covered by the policy is not, as we view it, in any manner impaired * * *."

We call the Court's attention to a case decided in 1949 in the State of Arkansas entitled *Southern Farmers Mutual Ins. Co. v. Motor Finance Co.,* 222 S.W. (2d) 981. In that case the insurer had insured a car against theft and refused to pay a claim on the ground of lack of ownership. It was definitely established in the case that another insurance company, the Agricultural Ins. Co., had paid one of its insureds under a theft claim for this car and under its subrogation rights had taken the car away from the insured under the policy of the Southern Farmers Mutual Insurance Company. This Arkansas case reviews the *Hessen* case (Iowa), cited and quoted in

our opening brief (A.O.B. page 10) and the *Norris* case, a New Jersey case, and the *Barnett* case referred to as the Washington case. At page 983, the Court states:

> "It is true that the original owner is not a party to this litigation, but there was no occasion for him to intervene and assert his title, for the reason that his insurer, who had paid him the value of the car, asserted title thereto by way of subrogation and took possession of the car, apparently, as has been said, without objection. There was no occasion for the original owner, or the insurer to intervene as the insurer by subrogation has the possession of the car and the right to possession is not called into question. The New Jersey case, which the Washington case followed, is therefore not applicable, because the true owner's title was asserted and is not questioned in this law suit. In the chapter on automobiles, 5 Am. Jur. Sec. 514, Page 794, it is said: 'Automobile insurance policies frequently contain provisions to the effect that the policies shall be void if the interest of the assured is other than that of an unconditional and sole owner. A purchaser of a stolen car does not have sole and unconditional ownership.' "

We call the Court's attention to the fact that the Arkansas case is more nearly in point as far as its facts are concerned than the New Jersey or Washington cases. In this case, the true owners are not asserting their title, inasmuch as the true owners have possession of the car. We point out that in this case appellees knew where the car was at the time of

the trial and if they were the owners of it, they could have recovered it.

Under the circumstances, we feel the Court should follow the rule of the *Hessen* (Iowa) case and the rule of the Arkansas case. We state that instead of the record showing that appellees were the sole owners of the automobile, the record overwhelmingly shows that the appellees are not the sole owners.

In fact, the record is silent as to any documentary evidence of any kind as far as the Lutfys are concerned. There is no document referring to title, there is no receipt for money paid, there is no cancelled check offered in evidence to prove that money was paid, there is no cancelled money order, no document from the Exchange National Bank showing that the lien had been paid by the Lutfys, and no license plates to the Illinois car.

As a matter of fact, the appellees in this case did not even allege in their complaint that they were the owners of the automobile (T.R., pages 2, 3, 4 and 5). Careful reading of Paragraph III (T.R. 4) would indicate a careful wording to avoid the use of the words "owner" or "ownership", and appellees only pleaded that they had been deprived of the possession of the automobile. At page 4 of their answering brief, appellees claim that they are still the owners of the automobile. If that is true, appellees should recover the car and only make a claim against appellant for damages.

We quote from plaintiff's Exhibit A, the policy in question:

"(T.R. page 32): * * * The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or *may* return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value *but there shall be no abandonment to the company.*" (Italics ours.)

What appellees have attempted to do in this case is abandon the automobile to the company. This they cannot do under the terms of the policy. We quote another portion of the policy to definitely establish this fact and call the Court's attention to the fact that the contract must be read as a whole and not clause by clause:

"(T.R. page 29): Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, *on the date the whereabouts of the automobile becomes known to the insured or the company* or on such earlier date as the company makes or tenders settlement for such theft." (Italics ours.)

A reading of this paragraph in the policy definitely shows that the company has the duty of finding the automobile and may, if it so desires, return the automobile, but at least is not charged with the duty of recovering it, particularly where that attempted re-

covery would be doubtful, as in this case. We submit that appellees have failed to carry the burden required of them of proving, by a preponderance of the evidence, that they were the sole owners of the automobile alleged to have been stolen and have failed to prove an insurable interest in the automobile covered in the policy.

II.

APPELLEES MADE MISREPRESENTATIONS OF MATERIAL FACTS.

Under this heading, appellant claims that appellees made misrepresentations of material facts which voided the policy. The answer of appellees is apparently that there is no showing that the facts which were misrepresented were material facts. We are surprised, however, at the statement on page 4 of appellees' answering brief to the effect that there was no showing that the car insured was not a new car and was not a 1947 model. In face of the exhibits in the Transcript of Record, from pages 69 to 89, we are at a loss to understand such a statement. If Mrs. Lutfy claims she bought the automobile covered under the policy from Don E. Jordan, then that should establish, from all the certificates of title and all the applications made therefor without one single change, that the car was a 1946 model and that it was first sold on January 8, 1947. How can a car which was sold on January 8, 1947, which had a mortgage on it of one thousand five hundred seventy-seven and

89/100 dollars ($1,577.89) to the Exchange National Bank, placed thereon sometime in April of 1947, be considered as a new automobile?

In April of 1947, according to defendant's Exhibit 2 (T.R., pages 72-73), Don Jordan applied to the Secretary of State of Illinois to register a lien on this automobile and requested that the certificate of title be mailed to the Exchange National Bank. We submit that the record, without any contradiction, shows the car in question was not a new car in September, 1947, and was not a 1947 model.

Appellees then contend that the State of Arizona has ruled that these points are not material and cite the case of *North British & M. Ins. Co. v. San Francisco Secur. Corp.,* 30 Ariz. 599, 249 Pac. 761. That case merely holds that the insurer therein did not allege nor prove the materiality of those two points. Herein appellant both alleged and proved the materiality.

This Court should take judicial notice of the situation existing in 1947 regarding the market on automobiles, but in case the Court does not desire to do so, we call the Court's attention to the fact that, according to the record (T.R. page 76), Don Jordan paid four thousand eight hundred forty-eight dollars ($4,848.00) for this car when it was brand new in January of 1947. Appellees, nine (9) months later, paid five thousand four hundred twenty dollars ($5,420.00) for this same automobile and were willing to pay five thousand six hundred dollars ($5,-

600.00) for it, indicating that in the used car market, an automobile brought a higher price than a new car, first, because of the scarcity of new cars, and, secondly, because of the ceiling price which had been on new cars for such a long time, thus keeping the price of new cars down.

If this car had been insured as a new car, apparently its value would have been much less and appellant could have paid much less for the loss of the car as a new car than for the loss of it as a used car, as shown by the record itself.

Counsel also makes much of the fact that the record discloses that the lien was paid when the appellees purchased the automobile. (A.A.B. page 5.) If Mrs. Lutfy purchased this automobile in September of 1947, and if the lien was paid at that time, then we must ignore entirely the record (T.R. page 71) which shows that the lien was paid on October 16, 1947. That statement was sworn to before a notary public on the 16th day of October, 1947, in Chicago. (T.R. page 71.)

Appellees also state on page 5 of their answering brief that the original certificate of title issued to Jordan did not carry the statement that there was a lien. Of course, that is true when it was originally issued, but in April of 1947, Jordan applied to have the lien registered (T.R. pages 72-73), and the certificate of title was requested to be mailed to the Exchange National Bank. It is noted that this original bill of sale and certificate of title was surrendered

on April 18, 1947 (T.R. page 76) to the Secretary of State. The one with the lien on it was surrendered on October 24, 1947. (T.R. pages 77-78.) Appellees try to make much of the fact that appellant had information that the mortgage was paid off to the Exchange National Bank (A.A.B. page 5) and appellees refer to Exhibit 1, pages 65 and 66 of the Transcript. All counsel for appellant was trying to do at that point was to ascertain if Mrs. Lutfy had any information about the payment of the mortgage, but that is not evidence that any moneys the Lutfys paid for the payment of the car was to discharge the mortgage. It was merely a statement of counsel and Mrs. Lutfy's answer was that she neither saw evidence of the lien nor did she see Jordan pay any money to the bank. (T.R. page 66.)

Appellees apparently have missed the points as to the misrepresentations, because they claim, in any event, that the policy was not voided because the lien was discharged prior to the time the loss occurred. The point that appellant makes is that there was a misrepresentation at the time the policy was issued in September that there was not a lien on the car. If the Lutfys had told their insurance agent that the car was a new car, and also in the same breath, said that there was a mortgage on it to the Exchange National Bank in the amount of one thousand five hundred seventy-seven and 89/100 dollars ($1,577.89), clearly the insurance company would have been put on notice and would then have exercised its right to inquire and would have then ascertained the true

situation. Failing to disclose those facts placed the company in a position which made it difficult, if not impossible, to exercise clear judgment as to the amount of or the hazard of the risk involved.

III.

APPELLEES CONCEALED MATERIAL FACTS.

Under this heading appellees apparently admit that facts were concealed but only claim that they were not material facts and also that appellant hasn't shown that placing Arizona license plates was in any way illegal or unlawful. Knowing that the Court will take judicial notice of the Arizona Motor Vehicle Act, we hesitate to reply to appellees' argument under Point III. We call the Court's attention to Section 66-211 of the Arizona Annotated Code (which is the Arizona Motor Vehicle Act), which, in substance, provides that the number plates assigned to an automobile shall remain thereon even though the registration and certificate of title is transferred. We also call the Court's attention to Arizona Code Annotated Section No. 66-205, Subsection C, regarding the registration of a foreign vehicle. In that section it is required that the owners of every foreign vehicle which has been registered in another state shall surrender to the Arizona Motor Vehicle Division the number plates assigned to such vehicle, the registration card, certificate of title, certificate of ownership, or other evidence of such foreign registration, together with

satisfactory evidence of ownership, showing that the applicant is the lawful owner or possessor of such vehicle.

How appellees can take the position, in view of the Arizona Motor Vehicle Act, that it wasn't illegal to put plates from one automobile on to an Illinois automobile is beyond our understanding. May we call the Court's attention to the fact that Mrs. Lutfy knew that the automobile had been registered in the State of Illinois. (T.R. pages 56-57.) She also claims that she had the certificate of title in her hand and endorsed the name of herself and her husband on it. (T.R. pages 58-59.) It is difficult to understand why Mrs. Lutfy did not obtain the Illinois license plates for this car, knowing, or claiming to know, that the car had been registered, and claiming to have the certificate of title in her own hands. As we have heretofore pointed out, there is absolutely no documentary evidence in the record showing that the Lutfys had any ownership in this car. If they only had the Illinois license plates, which they should have obtained if they were the bona fide purchasers of any car from the true owner, there would be some tangible evidence of their claim.

IV.

APPELLEES PREJUDICED SUBROGATION RIGHTS.

Under this heading appellant demonstrated that its subrogation rights were useless as far as the Lutfys were concerned and as far as this particular auto-

mobile was concerned. Appellees, in answering this point (A.A.B. pages 6, 7 and 8) merely claim that, first, the appellant was not entitled to any subrogation rights because it did not pay the loss, and, secondly, that appellees were still the owners of the automobile and it was up to appellant to effect a recovery. We respectfully call the Court's attention to the *Barnett* case (Washington) and the Arkansas case (supra), both of which involved the question of subrogation rights. We also call the Court's attention to the policy and the sections thereof regarding subrogation (T.R. page 34), and also regarding the section on no abandonment of the car to the company (supra). Clearly the law will not require the company to do a futile act.

Appellant found the car, and appellant established the record of title of the car, which clearly demonstrated the futility of attempting to recover it as the subrogee of the Lutfys. Appellant would only be in the same position that the Lutfys were in, and in appellant's viewpoint, the Lutfys had no interest in the car and could prove no interest in the car. To attempt to recover the car from Paul Horvath in Miami, Florida (T.R. page 87) would be an idle gesture and would be of no benefit to either the Lutfys or the company.

May we say in closing that the Lutfys, throughout the matter, have shown a lack of willingness to cooperate, as well as an inability to appreciate the position they are in. After not having received the license up to October 11, 1947, instead of getting in touch

with the Motor Vehicle Department of the State of Illinois, Mr. Lutfy wrote a letter to Mr. Marciano, 7925 South Trimble Avenue, Chicago, Illinois, and then stated that he (Marciano) was going to send it to the Motor Vehicle Department to effect the transfer. (T.R. page 47.) Even after October 11, 1947, Lutfy still did not get in touch with the Motor Vehicle Department, but talked to Mr. Marciano over the telephone. (T.R. page 47.) Certainly in a transaction involving over five thousand dollars ($5,000.00), it would seem that appellees would have exercised a little more business acumen and gotten in touch with the Motor Vehicle Department in Springfield, Illinois, or with Mr. Jordan, or with the Motor Sales Company in Chicago. Their failure to do so would indicate another reason why appellant was not willing to advance five thousand four hundred twenty dollars ($5,420.00) in payment of Lutfys' claim in the hope that sometime, somehow, the Lutfys would be able to produce some evidence of ownership which would allow the company to effect a recovery of the car, which, all parties at that stage of the proceedings knew, was in Miami, Florida.

Admittedly, appellant made no demand for documents from the Lutfys, because the Lutfys had no documents to produce, and throughout this entire matter, and even up to the time of the denial of the liability, and clear through this entire trial, no documents have been produced to establish ownership of the car in the Lutfys.

CONCLUSION.

Appellant submits that appellees did not prove their case in the lower Court and have failed to establish any reasons in their answering brief why the judgment should not be reversed.

Dated, San Francisco, California,
May 22, 1950.

Respectfully submitted,
WILLIAM A. WHITE,
EDWARD A. BARRY,
Attorneys for Appellant.

No. 12455

United States
Court of Appeals
for the Ninth Circuit.

JIM YUEN JUNG,

Appellant,

vs.

BRUCE G. BARBER, District Director for the Immigration and Naturalization Service, San Francisco,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States of America

No. 92824

PETITION FOR NATURALIZATION

[Under Section 324 (a) of the Nationality Act of 1940 (Public, No. 853, 76th Cong.)]

To the Honorable the District Court of the United States at San Francisco, California.

This petition for naturalization, hereby made and filed, respectfully shows:

(1) My full, true, and correct name is Jim Yuen Jung.

(2) My present place of residence is 12 Beckett St., San Francisco, Calif.

(3) My occupation is Sgt. U. S. Army. (4) I am 37 years old. (5) I was born on July 12, 1912, in Seung on Lee Village, Hoy Ping, Dist. of Kwangtung Province, China. (6) My personal description is as follows: Sex, male; color, yellow; complexion, sallow; color of eyes, brown; color of hair, black; height, 5 feet 8 inches; weight, 175 pounds; visible distinctive marks, mole, left side mouth; race, Chinese; present nationality, Chinese. (7) I am married; the name of my wife is Tom Shee; we were married on April, 1930, at Hong Kong, China; she was born at Toyshan District, China, on unknown 1914 * * * and now resides at Hong Kong, China * * *.

(8) I have 3 children; and the name, sex, date and place of birth, and present place of residence of each

of said children who is living, are as follows: Chew Suey (M), born in China, May 20, 1932, now resides in China; Chew Gin (M), born in China, Feb. 16, 1934, now resides in China; Chew Ming (M), born in China, Sept. 1, 1941, now resides in China.

(9) My last place of foreign residence was Hong Kong, China. (10) I emigrated to the United States from Hong Kong, China. (11) My lawful entry for permanent residence in the United States was at San Francisco, Calif., under the name of Jung Jim Yen on March 13, 1941, on the SS President Coolidge.

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows: * * *

Forms N-421 and N-440 attached hereto and made a part hereof. Pet. amended Nov. 23, 1949, to correct place of birth as Seung on Lee Village, Hoy Ping Dist., Kwangtung Province, China.

* * *

(14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. (15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruc-

tion of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (16) I am able to speak the English language (unless physically unable to do so). (17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (18) I have resided continuously in the United States of America for the term of 5 years at least immediately preceding the date of this petition, to wit, since March 13, 1941 and continuously in the state in which this petition is made for the term of 6 months at least immediately preceding the date of this petition, to wit, since January, 1944. (19) I have not heretofore made petition for naturalization. * * *

(20) Attached hereto and made a part of this, my petition for naturalization, are my declaration of intention to become a citizen of the United States (if such declaration of intention be required by the naturalization law), a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America * * *

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name: So Help Me God.

Alien Registration No. .....

No Fee U. S. Army man.

/s/ JIM YUEN JUNG.

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is George Wong, my occupation is unemployed, I reside at 834 Vallejo Street, San Francisco, California, and

My name is Robert Woo, my occupation is manager, insurance office, I reside at 820 Jackson Street, San Francisco, California.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with Jim Yuen Jung, the petitioner named in the petition for naturalization of which this affidavit is a part, since October 1, 1949, to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and at San Francisco in the State of California continuously since October 1, 1949, and

I have personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

/s/ GEORGE WONG.
/s/ ROBERT WOO.

* * *

When Oath Administered by Designated Examiner

Subscribed and sworn to before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit at San Francisco this ninth day of November, A. D. 1949.

/s/ JOHN F. O'SHEA,
Designated Examiner.

I Hereby Certify That the foregoing petition for naturalization was by petitioner above named filed in the office of said court at San Francisco this ninth day of November, A. D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] /s/ MARIE L. BALDWIN,
Deputy Clerk.

Oath of Allegiance

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God. In acknowledgement whereof I have hereunto affixed my signature.

/s/ JIM YUEN JUNG,

Sworn to in open court, this—day of—, A.D. 19. .

C. W. CALBREATH,

Clerk.

* * *

Petition denied: List No. 2279, Nov. 30, 1949, failure to establish good moral character. See order book 11/23/49. List 2278. Submitted Judge Goodman Nov. 23/49 filed U. S. Exl, "Verification of Service Form N-423, Dec. 7, 1949, filed Notice of Appeal and notified U. S. Atty and Dist. Director of Imm. and Nat'zn. Dec. 29/49 filed reporter's transcript of hrg. Jan. 6, 1950, filed designation of record on appeal. Jan. 9, filed designation of record on appeal.

Original

U. S. Department of Justice
Immigration and Naturalization Service

CERTIFICATE OF EXAMINATION

Petition No. 92824

U. S. District Court, San Francisco, Calif.

I hereby certify that Jim Yuen Jung residing at 12 Beckett St., San Francisco, California, an applicant for naturalization, and the required two witnesses, namely, George Wong, residing at 834 Vallejo St., San Francisco, California; Robert Woo, residing at 820 Jackson St., San Francisco, California, appeared before me and were examined on November 9, 1949, in accordance with section 324-A of the Nationality Act of 1940, and that the statements contained in the said applicant's petition for naturalization constitute the record of such examination.

/s/ C. A. ANTONIOLI,
U. S. Naturalization Examiner.

Note to Clerk—This certification must be attached to the original petition for naturalization at the time of filing.

In the United States District Court sitting at San Francisco, California

Petition No. 92824

AFFIDAVIT FOR USE UNDER SECTION 324 OR 325, NATIONALITY ACT OF 1940 (54 STAT. 1149-1150), IN SUPPORT OF PETITION FOR NATURALIZATION BASED ON MILITARY, NAVAL, OR MERCHANT MARINE SERVICE.

In the Matter of the Petition of:

Jim Yuen Jung to be admitted as a citizen of the United States.

The petitioner above named, being first duly sworn, on oath deposes and says:

1. (In case the application is based upon at least 3 years' service in the United States Army, Navy, Marine Corps, or Coast Guard the paragraph next following should be executed.)

I entered the United States Army on May 17, 1946, under Serial No. 19 260 190, and am still serving honorably therein.

* * *

/s/ JIM YUEN JUNG.

Subscribed and sworn to before me, and honorable discharge certificate or certificate of service showing good conduct of petitioner exhibited to me, this ninth day of November, 1949.

[Seal] /s/ C. A. ANTONIOLI,
Naturalization Examiner.

* * *

NATURALIZATION PETITIONS
RECOMMENDED TO BE DENIED

Date November 23rd, 1949. List No. 2278.

This list consists of four sheets. Sheet No. 3.

To the Honorable the District Court of the United States sitting at San Francisco, California.

F. P. Boland duly designated under the Nationality Act of 1940 (54 Stat. 1156) to conduct preliminary hearings upon petitions for naturalization to the above-named court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing the following one (1) petitioners for naturalization and their required witnesses, has found for the reasons stated below, that such petitions should not be granted, and therefore recommends that such petitions be denied.

Petition No. 92824.

Name of petitioner, Jim Yuen Jung.

Reason for denial, he has failed to establish that he has been a person of good moral character during the period required by law.

Respectfully submitted,

/s/ F. P. BOLAND,
Officer in attendance at final hearing.

Date November 23rd, 1949.

[Endorsed]: Filed November 23, 1949.

In the District Court of the United States, Northern District of California, Southern Division
No. 92824

In the Matter of the Petition of
JIM YUEN JUNG, for naturalization.

REPORT AND RECOMMENDATION OF THE DESIGNATED EXAMINER

The issue presented in this case is whether the petitioner has been a person of good moral character during the period required by law, as contemplated by Section 324(a) of the Nationality Act of 1940 (8 U. S. C. 724(a)).

The petitioner first came to the attention of the Immigration and Naturalization Service when he arrived at the port of San Francisco on the SS "President Coolidge" on March 13, 1941, then seeking to enter the United States as a native born citizen.

The petitioner was held for examination by a Board of Special Inquiry, and testified before that board, through several Chinese interpreters, on April 21 and 22, 1941, August 29, 1941, and October 14, 1941. He claimed repeatedly that he had been born on July 12, 1912, at 631 Pacific Street, San Francisco, California; that he had left San Francisco on May 14, 1913, on the SS "Manchuria" for China, with his mother Chin Shee or Chin How Moi and remained in China until his departure for the United States from Hongkong in 1941. He further testified that his mother remained in China from

1913 until she died at Hongkong at his home on August 13, 1935, and that his father, Jung Goon, last left the United States on December 6, 1911 and died in Hongkong on January 5, 1913. He presented three purported affidavits to support his contention that the facts were as he claimed:

(1) By Chin Sing, sworn and subscribed to before Notary Public L. C. Naughton on March 11, 1940, in the Burough of Manhattan, County of Kings, New York, identifying the petitioner and stating that he was born in San Francisco on July 12, 1912

(2) By Chin How Moi, petitioner's alleged mother, purportedly subscribed and sworn to before Notary Public Harry L. Horn, May 12, 1913, in San Francisco, California, and witnessed by R. R. Bellingall. To this affidavit is attached a photograph of a child, claimed by Jung Jim Yuen to be himself, purportedly visaed to show departure of that child from San Francisco, May 14, 1913, on the SS "Manchuria," signed "W. D. Heitmann, Inspector." This document intended as an affidavit of birth and identity.

(3) A two page affidavit purportedly made jointly by R. R. Belingall, Mrs. P. J. Connolly and Clara Waite, May 12, 1913, before Harry L. Horn, in San Francisco, intended as an affidavit of birth and identity.

These alleged affidavits were the only documentary evidence presented by Jung Jim Yuen bearing on his claimed relationship and citizenship. Investigation

developed that these affidavits were fraudulent documents and that Jung Jim Yuen's testimony, given under oath, was false.

In this connection, the following comments taken from the summary of the Chairman of the Board of Special Inquiry, dated October 22, 1941, are pertinent:

The departure "visa" stamp impression purporting to show departure of the applicant on May 14, 1913, on the alleged mother's "affidavit" was not an impression made by the official stamp then in use—the measurements were different, the ink was of a different color, and the signature, "W. D. Heitmann" thereon was found to be a forgery.

The purported signatures of R. R. Bellingall on the 1913 "affidavits" were stated by R. R. Bellingall himself to be forgeries.

There is no record of departure from this port by the applicant and his alleged mother on the SS "Manchuria," May 14, 1913, and no copy of the purported 1913 affidavits on file here in San Francisco, as there would be if the departure had occurred as and when claimed. The SS "Manchuria" did not sail from this port for the Orient on May 14, 1913, but did sail April 12 and June 26, 1913, but not on any day between the latter two dates; no vessel sailed from San Francisco for the Orient on May 14, 1913.

The "affidavits" purportedly executed in San Francisco on May 12, 1913, before a notary public, Harry L. Horn, and that purportedly executed in New York City on March 11, 1940, before notary

public L. C. Naughton, were actually typed on the same typewriter, and the signature "L. C. Naughton" in the jurat of the last mentioned document was said by the son of L. C. Naughton to be a forgery. L. C. Naughton himself could not have signed the document since he died on February 27, 1931, and the affidavit purports to have been executed on March 11, 1940.

From the foregoing it appears that the documents were executed not too long before the subject landed, and that the affidavits purporting to be executed in 1913 and in 1940 were executed at the same time. Notwithstanding the discrepancies, which were pointed out to applicant, he insisted that his mother took the 1913 documents with her to China and gave them to him sometime before she died and that he received the 1940 document in that year.

There were other discrepancies in the documents and in the case which were developed but no useful purpose would be served by going back into them further at this time.

It was concluded that the petitioner's claim of birth in the United States was without merit of the Board of Special Inquiry unanimously voted to deny him admission to the United States. An appeal was taken from the excluding order and was dismissed on March 5, 1942. The subject was released under $500 bond on February 13, 1942, due to war time conditions. Had the times been normal, he would not have been released but would have been deported on the next available steamer follow-

ing receipt of notice that the appeal had been dismissed.

The petitioner returned his Selective Service Questionnaire on July 2, 1942, from Cincinnati, Ohio, indicating that his residence was in that city. He also indicated that he had been born in San Francisco on July 12, 1912. A penciled notation on the Selective Service Questionnaire indicated that the petitioner was on temporary leave on bond from the Immigration authorities. Petitioner obtained occupational deferment on the ground that he was running full time chicken ranch. He quit this job and went to work for the shipyards for a time. His employment was terminated by one company on April 21, 1945, due to petitioner's continual absences. In April, 1945, he started the management of a restaurant in San Francisco. He did not notify his draft board of his change in address or occupation.

On October 1, 1945, the petitioner was apprehended for violation of the Selective Service Act, was indicted for failure to notify his draft board of his change of status, plead not guilty, was found guilty by the Honorable Louis E. Goodman and sentenced to serve six months in prison at McNeils Islands.

On May 17, 1946, the subject was inducted into the Army of the United States and has served therein continuously from that date. The Army records show that he claimed that he was born in San Francisco, California, on July 12, 1912. The petitioner is still carried in the Army records as a native of San Francisco. Under date of May 31, 1946, the local

board 76 forwarded to this service a copy of a letter to it from one G. R. Jones, First Lt., Inf., Assistant Recruiting Officer, dated May 28, 1946, which reads in part as follows:

"The Citizenship Officer desires me to write you and ask on what grounds this man was registered as an alien (referring to petitioner). He states he was born in San Francisco on 12 Jul 1912, and moved to China about 1913. He married in China and returned to the United States in 1940. I would appreciate further information from the Immigration Bureau concerning this man in order for us to determine his status."

The appropriate Army authorities were informed of the true status of the subject and it was requested that this Service be informed if his early discharge from the Army was contemplated. Under date of July 2, 1946, a letter was received from the petitioner's organization stating in part, "No action effecting his discharge is anticipated and the only Army regulation governing this case, AR 615-366, makes no provisions for discharges of this nature."

The subject filed his petition for naturalization on November 9, 1949, and the usual verification of service was obtained. This recites that the petitioner was enlisted into the active federal service on May 17, 1946, and honorably discharged on May 16, 1949. The date and place of birth are shown to be San Francisco, California, July 12, 1912. Petitioner has submitted a copy of his orders, dated October 3, 1949, which are considered as establishing that he

had re-enlisted and is still in the military service.

On November 18, 1949, the petitioner made a sworn statement to an officer of this service and then admitted that he was born in China and that he obtained the "affidavits" there. He claimed birth in San Francisco because that was the only way to obtain entry into the United States.

It is the recommendation of the service that the petition of Jim Yuen Jung be denied on the ground that he has failed to establish that he has been a person of good moral character during the period required by law.

/s/ FRANCIS P. BOLAND,
Designated Examiner.

[Endorsed]: Filed November 23, 1949.

GOVERNMENT EXHIBIT No. 1

VERIFICATION OF MILITARY OR NAVAL SERVICE UNDER SECTION 324 OR 701, OR SERVICE AS SEAMAN UNDER SECTION 325 OF NATIONALITY ACT OF 1940, AS AMENDED.

Dear Sirs:

Please return to the indicated office of the Immigration and Naturalization Service the duplicate of this form, and furnish to that office, on the duplicate of this form or otherwise, a duly authenticated copy of my record of service, including solely the numbered items listed below, for my use in filing a peti-

tion for naturalization under the provisions of Section 324, 325, or 701 of the Nationality Act of 1940, as amended.

The following facts will identify me:

Full name, Jim Yuen Jung.

Other names by which I was officially known while in the service.

Date of birth, July 12, 1942.

Date of enlistment, May 16, 1946.

Date of discharge (Re-enlisted May 17, 1949, for 3 years).

Serial No. ASN RA 19 260 190.

Other pertinent data, shown on records as native of San Francisco, California.

Please include statement showing date and place of birth from service records.

/s/ JIM Y. JUNG.

Present address, 12 Beckett Street, San Francisco, California.

Department of the Army
31 October 1949

AGPI-I 201 Jung, Jim Y.
(17 Oct. 49)
Immigration and Naturalization Service
Appraisers Building, 630 Sansome St.,
San Francisco 11, California.

1. Date of enlistment (into active Federal service), 17 May 1946.

2. Date of discharge, 16 May 1949.

3. Character of discharge, Honorable.

4. Date and place of birth, 12 July 1912, San Francisco, California.

I certify that the information here given concerning the service of the person named above is correct according to the records of the office of the Adjutant General of the Army.

[Seal] /s/ EDWARD F. WITSELL,
Major General,
The Adjutant General.

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31 October 1949

AGPI-I 201 Jung, Jim Y. (17 Oct. 49)
Director, Immigration & Naturalization Service

The records further show that subject enlisted man reenlisted in the Regular Army 17 May 1949 and entered on active duty the same day.

The latest report of record in this office shows this soldier serving as a corporal, 516th Engineer Service Company, APO 503, c/o Postmaster, San Francisco, California.

Official statement of service furnished 31 October 1949.

By Authority of the Secretary of the Army.

[Seal] EDWARD F. WITSELL,
Major General,
The Adjutant General.

[Stamped]: Received Nov. 3, 1949, U. S. Immigration and Naturalization Service.

[Endorsed]: Filed November 23, 1949.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR NATURALIZATION

For the reason that petitioner, Jim Yuen Jung, has failed to establish that he has been a person of good moral character as required by Section 324(a) of the Nationality Act of 1940 (8 USC 724a), his petition for naturalization is denied.

Dated: November 30, 1949.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed November 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to Bruce G. Barber, District Director for the Immigration and Naturalization Service, San Francisco:

Take notice that the plaintiff in the above-entitled action hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment therein rendered and entered in the said Southern Division of the United States District Court for the Northern District of California on the 30th day of November, 1949, against said plaintiff.

Dated this 7th day of December, 1949.

/s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed December 7, 1949.

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF CERTIFIED COPIES OF ORIGINAL DOCUMENTS

It Is Hereby Stipulated by and between counsel for appellant and counsel for appellee that a certified copy of the Petition for Naturalization mentioned in the designation of contents of record on appeal shall be transmitted with the appellate record in this case and may be considered by the Court of Appeals in lieu of the original copy of said documents.

JACKSON & HERTOGS,

By /s/ JOSEPH S. HERTOGS,
Attorneys for Appellant.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney,
Attorneys for Appellee.

[Endorsed]: Filed January 6, 1950.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF CERTIFIED COPIES OF ORIGINAL DOCUMENTS

By stipulation of counsel, It Is by This Court Ordered, and the Court does Hereby Order the Clerk of the above-entitled Court to transmit with the appellate record in said cause a certified copy of the original Petition for Naturalization No. 92824.

Done in Open Court This 6th day of January, 1950.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed January 6, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court for the Northern District of California, Southern Division:

It is respectfully requested that the following be submitted to the Clerk of the United States Court of Appeals for the Ninth Circuit:

1. Certified copy of Petition for Naturalization

filed by Jim Yuen Jung, No. 92824, on November 9, 1949.

2. Copy of record of Naturalization Petitions Recommended to be denied. (Form N-484.)

3. Report and recommendation of the designated examiner.

4. Reporter's Transcript of the proceedings in open court before the Honorable Louis E. Goodman, Judge, dated November 23, 1949.

5. Certificate of Military Service Form N-423.

6. Order denying Petition for Naturalization dated November 30, 1949.

7. Notice of Appeal.

8. Stipulation for transmittal of certified copies of original documents.

9. Order for transmittal of certified copies of original documents.

Dated this 6th day of January, 1950.

JACKSON & HERTOGS,
By /s/ JOSEPH S. HERTOGS,
Attorneys for Petitioner.

Service of above duly acknowledged 1/9/50.

[Endorsed]: Filed January 9, 1950.

In the Southern Division of the United States District Court for the Northern District of California

Petition No. 92824

In the Matter of the Petition for Naturalization of JIM YUEN JUNG

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

November 23, 1949, 10:00 a.m.

Appearances:

For the Bureau of Immigration and Naturalization:

FRANCIS P. BOLAND, ESQ.,
Examiner.

For the Petitioner:

Z. B. JACKSON, ESQ.

The Court: Do you wish the petitioner to take the stand?

Mr. Boland: Yes, if Your Honor please.

JIM YUEN JUNG

the petitioner herein, called in his own behalf; sworn.

The Clerk: Will you state your name to the Court, please?

A. Sgt. Jim Yuen Jung.

Mr. Boland: The essential facts in this case are

(Testimony of Jim Yuen Jung.)

not in dispute. I think we can save time by my making a statement of facts to which counsel may agree or take exception to such statement as he wishes.

This petitioner was born in China. He is an alien now and at all times during his life has been an alien. He is not a citizen of the United States. He presented himself at the Port of San Francisco on March 13, 1941, claiming birth in San Francisco on July 12, 1912. In support of his claim he presented three fraudulent documents, affidavits of birth and identity, and he supported those documents by his false testimony that he was born in San Francisco. These documents, after they were found to be fraudulent and it was concluded that he was not a citizen, resulted in his being excluded from the United States, and then the Board of Special Inquiry excluded him on his appeal. The appeal was dismissed on March 5, 1942, but at that time he could not be deported back to China, [2*] so he was released on a $500 bond.

He registered for the Selective Service Act on July 2, 1942. Thereafter he obtained occupational deferment because he was engaged in the management of a chicken ranch. He changed his employment. He went to work for a shipyard, went to work for two different shipyards. Then he quit that, or was fired for absenteeism, and he went into the restaurant business. He was apprehended on October 1, 1945, and indicted for failure to report

*** Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Jim Yuen Jung.)

his change of status to the draft board. He came before Your Honor and was sentenced on November 27, 1945, for violation of the Selective Service Act. He received a term of six months in prison. I present Your Honor with the criminal record, record of the former trial.

Thereafter on, I think it was May 16th—yes—May 17, 1946, he enlisted in the army and he is still serving in the army. It will be noted that that is more than three years' service. He filed petition for naturalization on November 9, 1949. He is here on a 60-day furlough from Japan. Now, I have here under the seal of the Department of the Army a statement of his service. I would like to offer that in evidence with the request that it be withdrawn at the conclusion of the hearing.

The Court: Very well; let it be marked as an exhibit.

(Statement of army service was thereupon marked United States Exhibit No. 1 for identification.)

Mr. Boland: It is our contention that the petitioner has [3] been acting reprehensibly throughout the whole proceeding. First of all, the presentation of fraudulent documents, his false testimony in 1941 in support of that; the fact that only the wartime conditions precluded his deportation; the obtaining of occupational deferment during the war while hostilities were going on, and then the chang-

(Testimony of Jim Yuen Jung.)

ing of that occupation without reporting to the draft board, a fact which might have resulted in his induction during hostilities; and the fact that he still is apparently making the claim of citizenship in the United States. That report there from the War Department is dated, I believe, October 31, 1949.

The Court: You mean he still stated he was born in the United States?

Mr. Boland: In San Francisco, yes. In other words, he has not purified, clarified the record.

The Court: Is this petition for naturalization now under the "As a member of the armed forces"?

Mr. Boland: Yes. It is under the same act as the previous petitioner this morning, three years in the United States Army.

The Court: What does the certificate of the army state?

Mr. Boland: It shows that he was——

The Court: Let me see that.

Mr. Jackson: Your Honor, right at this point I would like to mention that the army was informed in 1946—May 28, 1946—that the petitioner was an alien, and that they replied on July [4] 2nd, 1946, "No action effective for discharges anticipated," and that the only army regulations in this case makes no provision for discharge of this character, which would indicate for at least three years the army has been aware of his true status.

(Testimony of Jim Yuen Jung.)

The Court: You mean the army was notified in 1946, at the time of his enlistment, he was not born in the United States, not a citizen?

Mr. Jackson: Yes, shortly after his enlistment. He enlisted May 17, 1946, and they were notified May 28, 1946.

Mr. Boland: I have the copy of the letter which initiated the proceeding. I quoted part of it in my recommendation. That is on page 3 at the bottom there.

The Court: Apparently the Selective Service Board notified the army he was registered as an alien. In reply to that the army stated that the man stated that he was born in San Francisco when he was enlisted. Is that right? You say here under date of May 31, 1946, the local board 76—I assume he means Selective Service Board?

Mr. Boland: Yes.

The Court: "Forwarded to this service"—that is the Immigration Service—"a copy of letter to it." That is, to the local board from the recruiting officer of the army dated May 28, 1946.

Mr. Boland: Then we wrote to the army service forces, [5] attention Lt. G. R. Jones, that the subject arrived at this court in 1941 claiming that he had been born in San Francisco in 1912, departed on a visit to China, and returned as an application extended of from about 1913 to last return 1941. His claims were rejected and it was held he is an alien and was not entitled to enter this counter.

(Testimony of Jim Yuen Jung.)

His appeal was dismissed and he was ordered deported to China as soon as war conditions permitted. He was released on detention under bond. "Please furnish us with this man's army serial number and inform us if an early discharge from the army is contemplated."

The Court: I saw the answer to that. They said they had no provision for discharging him because their records showed he was born in the United States.

Mr. Boland: It appeared that he was transferred and that this last letter stating they had no provision to discharge him came from headquarters, Engineer Training Center, Fort Lewis, Washington. He was presently a member of Company "D," 64th Engineer Training Center, Fort Lewis, at the time they wrote this letter of July 2nd, 1946.

The Court: Well, of course, this Court is not called upon to determine whether the army should or should not keep the petitioner in the service. That I can't decide. I don't know what their regulations are on the subject. He is an alien, he is still in the armed forces of the United States. It is up to the army to determine whether they want to keep him in the army [6] or not.

Mr. Jackson: As a matter of fact, at that time he would have been inducted whether he was an alien or whether he was a citizen.

The Court: In 1946?

Mr. Jackson: 1946.

(Testimony of Jim Yuen Jung.)

The Court: The only question before the Court, as I see it, is whether or not as the matter stands now, on the basis of his service in the armed forces of the United States, whether he is or is not entitled to become a citizen of the United States.

Mr. Jackson: True.

The Court: And that depends on whether he has the character and qualifications to become an American citizen. Isn't that right?

Mr. Boland: Yes. It is our contention that the whole conduct all along the line, including the present army service—not the army service itself, but his conduct has been fraudulent. The army service was a part of a fraudulent plan to escape deportation, and he did not inform the army of the full true facts, and he still has not cleared up the records in the army, so that we do not know whether the army would want him.

The Court: Well, that is a matter for the army to determine. If the army discharges him as an alien, he would be subject [7] to the immigration laws of the United States if he is not a citizen.

Mr. Jackson: That is right.

The Court: The question is, should this Court make him a citizen now? If this Court makes him a citizen now, then he doesn't have to worry about what happens to him after he is discharged from the army. If this Court does not make him a citizen, then he might have to worry, might have that worry on his mind if the army decides to discharge him.

(Testimony of Jim Yuen Jung.)

Mr. Jackson: I understand they recently put in a regulation that aliens must be discharged unless they held first positions.

The Court: So the actual effect of what this Court does is establishing whether this man should, in the event of his impending discharge from the army, be permitted to remain in the United States or not; the effect being to determine whether he should be permitted to remain here or not. In order to permit him to remain here, he has to be made a citizen.

Mr. Jackson: That is right.

The Court: If he isn't to be permitted to remain here, he shouldn't be made a citizen.

Mr. Jackson: You really have his whole fate in your hands.

The Court: Yes, but his record isn't good. I remember the case. There were some others along with him, had a ranch [8] up in the country and it was a phony, and they really had a lottery. The other two men received six months, too, I believe, and one of them received six months for violation of the Draft Act, too. I will be glad to hear what you have to say, counsel, what your viewpoint is with respect to admission.

Mr. Jackson: First of all, I would like to bring out one or two facts that haven't been included in Mr. Boland's report. The petitioner has served three and one-half years now. Practically all of it has been in the Yokohama area of Japan. He has

(Testimony of Jim Yuen Jung.)

advanced in rank from private to sergeant, where he is now. From all I can learn, and I am sure all the Government has, he has been a good soldier. There seems to be no argument about that. He has obviously been worried about his citizenship status, and he tells me shortly before he came back on this furlough he went to the Commanding Officer and talked over his situation with the captain, and the captain suggested he come back to the United States and try to straighten out his citizenship. Meanwhile, he has reenlisted for another three years, in which he has served six months, and apparently he intends to make the army his career.

By the way, we have a former buddy of his who served two and one-half years with him in Yokohama, if there is any question as to his ability and performance as a soldier.

He has no arrests other than the one on which Your Honor sentenced him. He has studied hard in the army, has taken [9] several courses, and it would seem he has tried to make amends. He is trying to be a good soldier, living up to the responsibilities he has. He has acquired a knowledge of English since he has been in the army, and passed the government examination after a study of about six days, which seems to be commendable.

The section under which this petition is filed seems to raise the question as to the burden of character that must be established and the method of proving that character. It is our contention that it is proved

(Testimony of Jim Yuen Jung.)

by the military records. That would seem to be the effect of the regulations. With Your Honor's permission, I would like to read briefly from this. This is a provision for petition of an applicant who files petition while still in the service. It reads thusly:

"At the time the petition for naturalization is filed, petitioner shall present duly authenticated copy of the records and the executive department having custody of the records covering the petitioner's service in the United States Army, Navy, Marine Corps or Coast Guard, which copies must show the period or periods of such service and that it was performed under honorable conditions. Such duly authenticated copy of service record shall be accepted as proof of good moral character, attachment to the principles of the Constitution of the United States . . ."

The section under which it is filed makes provisions for petition by one who is still in the service, one who is out of [10] the service, one whose service is not continuous, and for those whose service is not continuous it requires proof of five years of residence and presumably five years of character. From my reading of it, and I confess I have no precedent decisions, the deduction is that three years of character is required and that that shall be proved by an honorable discharge or copy of the service record on the defendant.

The Court: Three years?

(Testimony of Jim Yuen Jung.)

Mr. Jackson: Three years, yes. There are presently two sections under which a veteran may file. This one has been on the books for eight years. It relates only to those who have served three years in the Army, Navy, Marine Corps or Coast Guard. There is another covering veterans of World War II, regardless of length of service. I might add this: I corresponded with this man two years ago. He was then in Japan. And I advised him to wait until such time as he had three years' service before he made any attempt to come back here and apply for citizenship.

The Court: The legal question, then, involved would be whether or not the showing of three years in the service is sufficient or whether or not five years' good moral character is required at this time.

Mr. Jackson: That is correct. I would not attempt to try to preclude the Court from considering other things. I know you can and should. [11]

The Court: Of course, in the non-military aspects, many judges have adhered to the view that there is no precise period so far as good moral character is concerned, and I have written some opinions on that.

Mr. Jackson: I recall one you wrote on a case of mine.

The Court: Those are on non-military cases, of course. Technically the United States, of course, is still at war and the question, I suppose, will arise, and the Court should consider in the case of appli-

(Testimony of Jim Yuen Jung.)

cations by those in the military service—that involves, I think, a philosophy that perhaps has not been committed to writing in any decision as yet as to what Congress——

Mr. Jackson: I am sure it hasn't.

The Court: ——at the time in conferring citizenship on those who served in the armed forces as far as requiring proof of character is concerned.

Mr. Jackson: It is a reward statute.

The Court: Might be quite a question. What is your view of it, Mr. Boland?

Mr. Boland: The service feels that on a military case under 324-a—we have the two separate acts under 324-a and 324-A, which is the veterans' act for World Wars I and II, no particular length of time being required on that. The view is that the petitioner must show good moral character from the time of the filing of the petition to the date of the hearing, [12] but that his conduct for a reasonable period prior to the filing may be considered as indicating what his character is as of the filing of the petition. For example, we had one case where the man had made false claims as to his marital status up to about 60 days before the filing of the petition, and the service recommended denial in that. On these cases under 324-a we have not received a definite ruling on that, but I believe the service viewpoint would be that he need show good moral character only for the period of the service.

The Court: This is not an application under 324-a—small a, as you put it?

(Testimony of Jim Yuen Jung.)

Mr. Boland: It is under "small a," the three-year case. If he had cleared up his record and gotten into the army fairly and squarely three years ago, or when he did, we would not at this time have any objection to it.

The Court: You are objecting to it on the ground that there is an element of fraud and bad faith in connection with the enlistment in the service in the army itself, even though his actual service as a soldier was meritorious?

Mr. Boland: Yes, Your Honor.

The Court: That is your point?

Mr. Boland: It is part of his general plan to remain here and escape deportation.

Mr. Jackson: Oh, I don't think that is part of it.

Mr. Boland: That is just our inference. [13]

Mr. Jackson: I know that is just your inference. That is conjecturing.

The Court: The facts are undisputed in this matter?

Mr. Boland: That is right.

The Court: No question about the facts?

Mr. Jackson: No, there is none.

The Court: It is really a question of what under this 324-a (small a, as you put it)—how the Court should view this particular application for citizenship against the background of the admitted facts in the case.

Mr. Boland: There is a question, too, how would the army, if it were presented to them for the purpose of making a certification of his service, view

(Testimony of Jim Yuen Jung.)

his claim of birth in San Francisco. That is speculation.

Mr. Jackson: They have already passed on that. They just certified him as honorable.

Mr. Boland: They still certify he was born in San Francisco, according to their records.

The Court: They say that is what he told them, but according to what counsel says now, it having been called to the attention of the army, he is in fact an alien, the army may discharge him, is that correct?

Mr. Jackson: That is my understanding as to the present regulations. I don't see how the army could possibly have passed knowing his true status. Your Honor, there is the [14] transaction of 1945, those are completely detailed in the probation report. The FBI original report of this current proceeding in courts sets forth the entire history, and I think the false claim of citizenship that appears in the War Department records is based on registration for the draft in 1942.

The Court: If I may interrupt you, I don't think it is particularly important whether the Army knew or not. I think that the most important problem that you have is the admitted fact that he stated to the Army that he was born in the United States when in fact he was not and had already been ordered deported for that reason. That is the significant thing that is against him in the older picture, the picture of the events that are three years or more old.

(Testimony of Jim Yuen Jung.)

Mr. Jackson: May I ask Mr. Boland one question?

The Court: Yes.

Mr. Jackson: Isn't it generally the view of your service that the period of character required is the period of residence specified?

Mr. Boland: Yes.

Mr. Jackson: I mean where it is a woman who requires one year of residence, two years——

The Court: They have urged that, but the courts haven't always agreed with that. For instance, in the case of a spouse they say they only have to show one year good moral character, and I think some of the judges haven't agreed they have to [15] follow that; a man is shown to have been guilty of some reprehensible offense or deed just two years before, that the Court isn't hamstrung, doesn't have to be bound by the theory that periods of good character and residence are coincidental. However, we do not have that before us. How long is this man going to be here?

Mr. Jackson: He is right at the desperate stage. His furlough terminates December 1st, which is next week, and he must report to Camp Stoneman to return to the Yokohama area by December 1st. Isn't that right?

The Petitioner: Yes, sir.

Examination by the Court

The Court: How old are you now?

A. 37 now, sir.

(Testimony of Jim Yuen Jung.)

Q. It is true when you enlisted in the Army you told them you were born in the United States?

A. I was—I didn't understand English at all, but I went in the Army and went to MP school.

Q. You are a good soldier; you just answer the questions. That is the best way you can help yourself. The Army has in your records that you were born in San Francisco on such and such a date, and your record is to the effect that you told them, whether you understood English or not, you knew what you were doing. Did you tell them that when you went into the army? Did you tell them you were born in San Francisco? [16]

A. I think I tell them about it, yes, sir.

Q. Why did you do that?

A. Well, I don't know. I might make a mistake, sir. My English wasn't very well.

Q. Well, but you knew you had already been ordered deported. You had been refused entrance to the United States by the Immigration authorities because of the fact that you were born in China. Why did you tell the recruiting officer you were born in San Francisco? Forget about the fact that you didn't speak such good English. What was in your mind? Why did you tell them that?

A. Well, I think I like United States Army.

The Court: You just wanted to get in the Army and figured that was the way to do it?

A. Yes, sir.

(Testimony of Jim Yuen Jung.)

The Court: Well, I think I ought to give some consideration to this matter.

Mr. Jackson: May I call Your Honor's attention to one more thing?

The Court: Yes.

Mr. Jackson: Last week at the suggestion of Mr. Heckert, investigator of the Immigration Service who had appeared before Your Honor many times, we took the petitioner over to talk with Mr. Heckert. By the way, he was the man who conducted the board hearing when the petitioner first applied for admission [17] to the United States, and he wanted to get the true facts as to how Jim obtained the documents on which he first arrived here. We took him over and he testified very fairly and frankly as to how it all occurred. Briefly, it was arranged by a Chinese who formerly was an interpreter for the Immigration Service.

The Court: I suppose he paid something?

Mr. Jackson: Yes. He agreed to pay if he was successful, and he was furnished with fraudulent affidavits. Everyone deserted him, witnesses didn't show up. He couldn't correspond to this man, who was then in Hong Kong. At the conclusion of this statement, Mr. Heckert said he had told the entire truth and had been helpful to the Government, and told me he had added a report in his record in which he stated that if he were the examiner appearing before Your Honor, he would recommend that this man be naturalized.

(Testimony of Jim Yuen Jung.)

The Court: Because of the applicant's disclosure of the circumstances concerning those documents, which was of help to the Government in its investigation?

Mr. Jackson: Yes. They were very crude forgeries, supposedly notarized by a notary in New York who had died 18 years before that.

The Court: We have had a number of cases of that kind. A man who is committing an act of that kind is not able to foresee all possible contingencies that may come up and may make some mistake. That is how they are caught. [18]

Mr. Jackson: It was interesting to note the master mind was a former interpreter in the department himself. I think Mr. Boland has the report.

The Court: Is there any dispute that the applicant did make disclosures which were of help to the Government?

Mr. Boland: Mr. Heckert didn't tell me how much value it would be. He did state that he thought very well of him. Mr. Heckert is an investigator and very anxious to get any leads as to any forged documents.

Mr. Jackson: I think you will agree with me he isn't noted for being soft-hearted. One of the best investigators in the service.

The Court: The applicant has been a good soldier aside from these statements as to place of birth?

Mr. Boland: Yes, Your Honor.

The Court: Is he married?

(Testimony of Jim Yuen Jung.)

Mr. Jackson: He is married and has a wife and three children.

The Court: In China?

Mr. Jackson: Yes.

The Court: You were married in China?

A. Yes, sir.

Q. When were you married?

A. When I was 18 years old.

Q. That would be about 1930. They are being supported out of [19] an allotment taken out of your salary? A. Yes.

Q. Whereabouts in China does your wife live?

A. Well, the last time I heard from my wife was last month.

Q. Where was she?

A. She is in Canton.

Q. In the Canton area? A. Yes.

The Court: Well, with the statements made to me and the report I have all the facts in the matter, have I, before me?

Mr. Jackson: Yes.

The Court: I would like to give a few days' consideration to this matter.

Mr. Jackson: All right, Your Honor. If it would be possible to arrive at a decision by Monday——

The Court: Oh, yes. I understand.

Mr. Jackson: Time is running short on him.

The Court: He has to report on next Thursday?

Mr. Jackson: Yes, at Camp Stoneman.

(Testimony of Jim Yuen Jung.)

The Court: A week from tomorrow. Well, this is a rather unusual case. I think I might think about it a little bit.

Mr. Jackson: It is a rather tragic consequence. I feel somewhat responsible for him myself. I am afraid I have gotten him in a dilemma where he is either to be naturalized or winds up—— [20]

The Court: I think you have no reason to berate yourself in the matter. The situation isn't of your creation.

Mr. Jackson: That is true.

The Court: You are doing what you think best for the benefit of your client.

Mr. Boland: If the Court should decide that the petition should be denied, the petitioner could always be further informed and request dismissal so that no denial would be on the record.

Mr. Jackson: I don't know that that would be of any particular value to him. The principal question is whether he will be able to stay in the Army or if he is to be discharged.

The Court: I have no control over that. Whether the Army would be held bound by its regulations to discharge him now, I don't know whether they have any discretion or not.

Mr. Jackson: They usually seem to find some method.

The Court: If they keep him in the army, then maybe he might, if he is able to stay in the army, he might be better off to defer his citizenship application for a year or two.

(Testimony of Jim Yuen Jung.)

Mr. Jackson: He says he intends to make a career of it.

The Court: Why don't you talk to the army authorities about it? He might be better not to take a chance on this. It is a serious case and I would decide it now if I didn't have a doubt about it. He might be better off in any event. Of course the Government can appeal, too. He might be better off [21] to stay in the army and defer his application.

Mr. Jackson: I can't seem to get any decision on the question from the army. We couldn't even get more furlough. That has to be done through headquarters in the Yokohama area. I am sure whether he would be allowed to return would depend on his superior officer back there. It seems to me that everything that concerns you is decided in Yokohama, is it not?

The Petitioner: Yes, sir.

Mr. Jackson: We tried unsuccessfully to get two more weeks' furlough because we were afraid this would not come before the Court and we couldn't do it.

The Court: Well, I will give the matter further consideration.

Mr. Jackson: Thank you, Your Honor.

Mr. Boland: Thank you, Your Honor.

CERTIFICATE OF REPORTER

I, K. J. Peck, Official Reporter, certify that the foregoing 22 pages is a true and correct transcript

of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ K. J. PECK.

[Endorsed]: Filed December 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents listed below, are the originals filed in this Court, or true and correct copies, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Copy of Petition for Naturalization.

Report and Recommendation of the Designated Examiner.

Naturalization Petitions Recommended to be Denied.

Certificate of Military Service.

Reporter's Transcript for November 23, 1949.

Order Denying Petition for Naturalization.

Notice of Appeal.

Stipulation for Transmittal of Certified Copies of Original Documents.

Order for Transmittal of Certified Copies of Original Documents.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of January, A.D., 1950.

C. W. GALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12455. United States Court of Appeals for the Ninth Circuit. Jim Yuen Jung, Appellant, vs. Bruce G. Barber, District Director for the Immigration and Naturalization Service, San Francisco, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division. Filed January 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of U. S. Court of Appeals and Cause.]

No. 13455

In the Matter of the Petition of:
JIM YUEN JUNG for Naturalization

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THE ABOVE-ENTITLED MATTER

Comes now Jim Yuen Jung, by and through his

attorneys, Jackson & Hertogs, files herein the Statement of Points on which appellant intends to rely in the appeal of the above-entitled matter:

I.

The District Court erred in finding that said petitioner had not established good moral character as required by Section 324(a) of the Nationality Act of 1940 (8 USCA 724(a)).

II.

The District Court erred in denying appellant's petition for naturalization as a citizen of the United States.

JACKSON & HERTOGS,
By /s/ JOSEPH S. HERTOGS,
Attorneys for Appellant.

Receipt of copy duly acknowledged 1/6/50.

[Endorsed]: Filed January 6, 1950.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

Appellant, Jim Yuen Jung, by and through his attorneys, Jackson and Hertogs, in the above-entitled matter (in accordance with Rule 75(a) of the Federal Rules of Civil Procedure and Rule 75(a) of the General Equity Rules hereby desig-

nates the entire record in the above-entitled matter to be included in the Transcript on Appeal on its pending appeal from the judgment made, filed and entered in said matter November 30, 1949.

JACKSON & HERTOGS,

By /s/ JOSEPH S. HERTOGS,
Attorneys for Appellant.

Service admitted Jan. 6, 1950.

[Endorsed]: Filed January 6, 1950.

No. 12,455

IN THE

United States Court of Appeals

For the Ninth Circuit

JIM YUEN JUNG,
Appellant,

vs.

BRUCE G. BARBER, District Director for the Immigration and Naturalization Service, San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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No. 12,455

IN THE

United States Court of Appeals

For the Ninth Circuit

JIM YUEN JUNG,
Appellant,

vs.

BRUCE G. BARBER, District Director for the Immigration and Naturalization Service, San Francisco,
Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Appellant filed a petition for naturalization under the provisions of Section 324(a) of the Nationality Act of 1940 (Public Law No. 853, 76th Cong.) in the United States District Court for Northern District of California, Southern Division, on the 9th day of November, 1949 (T. 2). His petition for naturalization was denied by District Judge Louis E. Goodman on November 30, 1949 (T. 20). Notice of appeal was filed with the Clerk of the above-entitled Court on December 7, 1949 (T. 20).

Jurisdiction of the District Court to entertain the petition for naturalization is conferred by Section 301 of the Nationality Act of 1940 (8 U.S.C.A. 701). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The order of the District Court in denying the petitioner's application for United States citizenship is a final decision within the meaning of Section 128 of the Judicial Code. (See *Tutun v. U. S.,* 270 U.S., 568, 46 S. Ct. 425, 70 L. Ed. 738; *U. S. v. Rodick,* 162 F. 469).

STATEMENT OF THE CASE.

The petitioner first arrived in the United States at the Port of San Francisco, ex SS "President Coolidge," on March 13, 1941, seeking admission as a native born United States citizen; the appellant's application for admission was denied by a Board of Special Inquiry on the ground that he was an alien and not in fact a citizen of the United States when it was determined that the documents presented were forgeries; an appeal from such excluding decision was dismissed by the appropriate administrative authorities; the appellant was released under bond inasmuch as deportation could not be effectuated at that time due to war conditions.

The petitioner filed his Selective Service Questionnaire on July 2, 1942, stating that his residence was at

Cincinnati, Ohio, and his birth in San Francisco, California, on July 12, 1912; this questionnaire contained a notation that the subject was on temporary leave under bond from the immigration authorities; occupational deferment was requested and received. In April, 1945 the petitioner started management of a restaurant in San Francisco without notifying his draft board of a change of address and occupation. On October 1, 1945, he was apprehended for violation of the Selective Service Act; he was found guilty by the Honorable District Judge Louis E. Goodman and sentenced to serve six months at McNeil Island;

On May 17, 1946, petitioner was inducted into the Army of the United States; the Army records at the time of induction show the petitioner claimed to have been born at San Francisco, California, on July 12, 1912; on May 28, 1946, eleven days after induction, in response to an inquiry, the Army was advised by the Immigration and Naturalization Service that the petitioner herein was in fact an alien and a native and citizen of China; under date of July 2, 1946, the Immigration and Naturalization Service at San Francisco were advised, in reply to their correspondence, by the petitioner's Army organization that: "No action effecting his discharge is anticipated and the only Army Regulation governing this case, AR 615-366, makes no provision for discharges of this nature"; the subject is still carried on the records of the Army as a native of San Francisco.

Petitioner has served continuously in the United States Army from the date of his induction, May 17,

1946, and was still serving in the United States Army on the date of the filing of this petition for naturalization; during this time petitioner completed three years of service and was honorably discharged on May 16, 1949; he reenlisted on May 17, 1949, for an additional period of three years under which enlistment he is now serving.

On November 9, 1949, petitioner and two verifying witnesses appeared before a representative of the Immigration and Naturalization Service and were examined, said verifying witnesses being citizens of the United States who identified petitioner as the person who rendered military service upon which this petition is based.

On November 9, 1949, petitioner presented a duly authenticated copy of the record of the United States Army covering the petitioner's service in the United States Army from May 17, 1946, to November 9, 1949, such copy showing the period of petitioner's service and that such service was performed under honorable conditions.

The appellant's petition for naturalization was filed, and upon recommendation of the Immigration and Naturalization Service for denial, was denied by the Honorable Louis E. Goodman, United States District Judge, on November 30, 1949, for the reason that the said petitioner "has failed to establish that he is a person of good moral character as required by Section 324(a) of the Nationality Act of 1940."

SPECIFICATION OF ERRORS.

1. That the District Court erred in finding that said petitioner had not established good moral character as required by Section 324 of the Nationality Act of 1940 (8 U.S.C. 724).

2. That the District Court erred in denying appellant's petition for naturalization as a citizen of the United States.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

It is appellant's contention that Section 324 of the Nationality Act of 1940 provides that any person who has served in the Armed Forces of the United States continuously for an aggregate of at least three years and who is presently serving therein need not establish good moral character other than showing that such period of service was conducted under honorable conditions; and that duly authenticated copies of the records showing such service are conclusive evidence of the conditions prescribed.

ARGUMENT.

The question involved in this case appears to be one of first impression making it necessary to review the history of the naturalization process in order to reach a proper conclusion in this matter.

The Constitution of the United States, Article I, Section 8(4) grants Congress the power "to establish

a uniform rule of naturalization." Pursuant to such authority, Congress exercised that power and in 1940 enacted a complete new codification of the nationality and naturalization statutes. The general objects of that Act were to consolidate, rearrange, and provide a comprehensive administration of the naturalization laws. Insofar as we are presently concerned, it provides for uniform provisions under which persons serving honorably for at least three years in the Armed Forces of the United States can be naturalized and that certified copies of the records of service shall be accepted in lieu of the usual affidavits and testimony of witnesses.

The present legislation is not the first time that Congress has provided a special class of naturalization for the benefit of members of the Armed Forces. For years they granted certain benefits and exceptions for persons who served in the military or naval forces.[1] In substance it would appear that many of the statutory qualifications imposed on the ordinary alien before being granted the privilege of naturalization have been waived or modified by Congress for the specific purpose of providing less onerous terms for

[1]Section 2166, R. S. U. S., as amended by sec. 2, act of May 9, 1918, 40 Stat. 547; U. S. C., title 8, sec. 395; sec. 4, act of June 29, 1906, as amended by the act of May 9, 1918, 40 Stat. 542-546; as amended by sec. 6 (d), act of March 2, 1929, 45 Stat. 1514, and sec. 2, act of May 25, 1932, 47 Stat. 165; U. S. C., title 8, sees. 388 to 394, inc.; (U. S. C., title 8, sec. 388). Act of July 19, 1919, 41 Stat. 222; sees. 1 and 7, act of May 26, 1926, 44 Stat. (pt. 2) 654, 655; U. S. C., title 8, sec. 241; sec. 3, act of March 4, 1929, 45 Stat. 1546; U. S. C., title 8, sec. 392a; sec. 1, act of May 25, 1932, 47 Stat. 165; U. S. C., title 8, sec. 392b; act of June 24, 1935 (Public. No. 160, 74th Cong.), and act of June 24, 1935 (Public, No. 162, 74th Cong.).

those who have rendered honorable military service for the United States.

It has been held that the privilege of naturalization ripens into a right when the petitioner complies with all the conditions prescribed by Congress.[2] The question before us is: What are the conditions prescribed by Congress for a person who is now serving in and has for more than three years past served honorably in the armed forces of the United States?

In the ordinary naturalization case the petitioner must comply with the statutory provisions of Section 307(a) of the Nationality Act of 1940 (8 U.S.C. 707(a)). This part states that a petitioner must establish that he has been a person of good moral character for the required period of residence, i.e., five years. It is contended by appellant that he is removed from the provisions of this part by the specific provisions of Section 324 of the same Act.

Where the statutory language is not plain, the courts may look to the legislative history for further evidence of the legislative intent, in order to determine the policy of the legislation as a whole.

Chatwin v. U. S., 326 U.S. 455, 464;
U. S. v. Rosenblum Truck Lines, 315 U.S. 50, 55.

The Congressional debates on the pertinent provisions of the Nationality Act of 1940 shed little

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[2]*U. S. v. Schwimmer* (Ill.), 49 S. Ct. 448, 279 U. S. 644, 73 L. Ed. 889, reversing (C. C. A.) *Schwimmer v. U. S.*, 27 F. (2d) 742, certiorari granted *U. S. v. Schwimmer*, 49 S. Ct. 80, 278 U. S. 595, 73 L. Ed. 526; *Tutun v. U. S.* (Mass.), 46 S. Ct. 425, 270 U. S. 568, 70 L. Ed. 738.

light on the subject. The Act was passed by both the House and the Senate with little debate and practically no changes. The proposed law was drafted after long and lengthy hearings and discussions by members of the House and representatives from the Department of States, Office of the Attorney General, and the Department of Labor.

During the subcommittee's hearing, a report of the Committee of Advisors which contained the proposed code with explanatory comments was given due consideration. The complete comments were published along with the hearings conducted by the Committee on Immigration and Naturalization, House of Representatives, 76th Congress.[3] At page 436 and 437 in the cited publication the following appears:

> "Proposed section 307(a) continues the present requirements as to continuous residence within the United States for at least 5 years immediately preceding the filing of a petition for naturalization, and such continuous residence also from the date of filing the petition until admission to citizenship (subd. 4, sec. 4, act of June 29, 1906, 34 Stat. 598, as amended by a part of sec. 6(b), act of March 2, 1929, 45 Stat. 513-514; U.S.C., title 8, sec 382)."

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[3]Publication by United States Government Printing Office, Washington, 1945—To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code, Hearings before the Committee on Immigration and Naturalization, House of Representatives, Seventy-Sixth Congress, First Session on H. R. 6127 superseded by H. R. 9980, a Bill to revise and codify the Nationality Laws of the United States into a comprehensive nationality code, January 17, February 13, 20, 27, 28, March 5, April 11, 16, 23, May 2, 3, 7, 9, 13, 14, and June 5, 1940.

"The 5-year residence requirement has been a part of the naturalization statutes almost continuously from 1795. It is based upon the belief that a newcomer before being admitted to citizenship should remain in this country sufficiently long to establish his standing in the community, to learn the language, and to understand and appreciate the essential facts and meaning of its history and nature and principles of its Government. No material reason has been advanced for a change in this respect, except as to a few special groups of persons where the conditions would not appear to require 5-years' probation."

"There have been continued the stipulations that during all the period of necessary residence the applicant for naturalization must prove that he has been of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. These requirements also have been a fundamental part of our naturalization history since 1795 (subd. 3, sec. 1, act of January 29, 1795, 1 Stat. 414)."

The foregoing excerpt when considered with the language of Section 324(a), (b), (c), and (e) shows that it was the Congressional intent that the statutory requirement of good moral character shall be proved in this type of case by the duly authenticated copy of the record of honorable service (Appendix pp. i-ii). In Section 324 three years' service in the armed forces has been substituted in lieu of the usual requirement concerning the normal period of residence.

Referring to subparagraph (c), it is noted that Congress specifically provided that where the service was not continuous the petitioner must establish in the usual manner his good moral character, attachment, and favorable disposition *only* between the periods of petitioner's service. This is clearly another indication of the Congressional intent to limit the scope of required proof in this type of case.

In the instant case the petitioner has served continuously in the United States Army for more than three years; upon termination of his original enlistment he was separated under honorable conditions; and he immediately reenlisted for an additional period of three years which he is presently serving. A duly authenticated copy of his record of service for the required period and his discharge under honorable conditions was presented to the Court for its consideration.

Congress granted the Commissioner of Immigration and Naturalization the authority to prescribe such rules and regulations as might be necessary to carry into effect the provisions of the naturalization chapter (Section 327, Nationality Act of 1940; 8 U.S.C. 727(b)). (Appendix p. iii). Pursuant to such authority 8 C.F.R. 334.2 was adopted. The regulations contained therein are in perfect agreement and support the appellant's present contention. (Appendix p. iii). In addition, the designated examiner, during the course of examination of the petitioner in open court (T. 38), stated that it was the view of the Immigra-

tion and Naturalization Service that the period of proof of good moral character required is the period of residence required.

The Immigration and Naturalization Service objected to the petitioner's naturalization on the ground that there is an element of fraud and bad faith in connection with the enlistment in the service of the army itself, even though his actual service as a soldier was meritorious (T. 30).

It was decided by this Honorable Court in the case of *In re Fong Chew Chung,* 149 F2d 904, that the court could not go back of the honorable discharge. Here, in the instant case, the appellant was honorably discharged yet the government wants to find on nothing more than conjecture that such service was not performed under honorable conditions. The Immigration and Naturalization Service records show the Army was timely advised of the petitioner's alienage. The facts were before that administrative body within two weeks subsequent to the original enlistment and years prior to the issuance of the honorable discharge. The Immigration and Naturalization Service cannot attack the document and the court is bound by its finding.

Even though counsel has made an exhaustive diligent search for judicial authority on the subject, none can be found. We know that many thousands of veterans have been naturalized under the provisions of this part. Probably the logical explanation is that no court has heretofore challenged their right to this special dispensation granted by Congress.

The right of Congress to prescribe the scope of examination for those who seek the privilege of naturalization is without doubt. The appellant has performed a service or duty that Congress saw fit to reward with special benefits. Since the petitioner herein has met those qualifications how can it now be said that he is not eligible to that which Congress says he is entitled? The privilege of United States citizenship is cherished by all mankind, and a denial of that privilege, when all of the essential prerequisites have been met, is contrary to all of the legal concepts that form the foundation of our government.

PRAYER.

Wherefore, appellant prays that the decision of the District Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
March 6, 1950.

JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
One of Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

APPLICABLE STATUTES AND REGULATIONS.

The Nationality Act of 1940, as amended, so far as relevant to this proceeding (8 U.S.C. 324), provides:

"(a) A person, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing of such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service."

"(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that——

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and

at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service."

"(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by section 309. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization."

"(e) Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of records of the executive departments having custody of the records shall be accepted in lieu of affidavits and testimony or depositions of witnesses."

Section 327 of the Nationality Act of 1940 provides in part as follows:

> "(a) The Commissioner, or, in his absence, a Deputy Commissioner, shall have charge of the administration of the naturalization laws, under the immediate direction of the Attorney General, to whom the Commissioner shall report directly upon all naturalization matters annually and as otherwise required."
>
> "(b) The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this chapter and is authorized to prescribe the scope and nature of the examination of the petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States."

Part 334.2 of Title 8, Code of Federal Regulations, provides in part as follows:

> "* * * At the time the petition for naturalization is filed, the petitioner shall present duly authenticated copies of the records of the executive departments having custody of the records covering the petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, which copies must show the period or periods of

such service and that it was performed under honorable conditions. Such duly authenticated copies of service records shall be accepted as proof of the good moral character, attachment to the principles of the Constitution of the United States of America, and favorable disposition toward the good order and happiness of the United States of the petitioner for the periods of such service. * * *''

No. 12,455

IN THE

United States Court of Appeals

For the Ninth Circuit

JIM YUEN JUNG,
Appellant,

vs.

BRUCE G. BARBER, District Director for the Immigration and Naturalization Service, San Francisco,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellant filed his appeal on March 6, 1950, from an order denying his petition for naturalization entered in the District Court of the United States for the Northern District of California dated November 30, 1949, upon his failure to establish to the satisfaction of the District Court that he had been a person of good moral character as required by Section 324(a) of the Nationality Act of 1940. (8 U.S.C.A. 724(a)) under which Section he filed his petition.

His appeal designates Bruce G. Barber, District Director for the United States Immigration and

Naturalization Service, San Francisco, as the appellee. The appeal is ineffective because the appellee designated is not, and cannot be made to be, the proper party litigant in this proceeding since he is not empowered by Congress to grant the relief sought in plaintiff's bill of complaint.

The administration of the immigration and naturalization laws is placed generally under the authority of the Attorney General of the United States. *Congress has entrusted to the courts alone the power to grant or deny citizenship.* 8 U.S.C. 701. (See Appendix, note a.) The District Director of the United States Immigration and Naturalization Service is powerless to grant the relief sought by the appellant.

The United States of America is the only proper party to be named as appellee.

In the case of *Bonham, District Director of Immigration v. Chi Yan Chaim Louie,* 166 F. (2d) 15, and in *Carmichael v. Wong Choon Hoi,* 164 F. (2d) 696, the Ninth Circuit Court dismissed appeals where the local district director of the Immigration and Naturalization Service sought to bring the action in his own name. The Court held he was not a proper party to the litigation. Furthermore, a motion to substitute the United States of America as appellant in the *Chi Yan Chaim Louie* case, supported by the appellee's stipulation that the United States be so substituted, was denied on the ground that such stipulation could not confer jurisdiction.

It seems clear, therefore, that in this case, as in those above cited, the appeal should be dismissed for lack of the proper party defendant.

STATEMENT OF THE CASE.

The appellant was born in China on July 12, 1912. (T. 25.) On March 13, 1941, he applied for entry into the United States as a United States citizen claiming to have been born in San Francisco, California. (T. 25.) He conspired with others in this design and presented fraudulent affidavits to support his claim. (T. 25.) Upon discovery of the attempted fraud an order excluding him from the United States was made by a Board of Special Inquiry, and on appeal to the Board of Immigration Appeals the order was sustained. Due to the war, however, he could not be sent back to China, and he was released on bond. (T. 25.)

On July 2, 1942, in his Selective Service questionnaire he again falsely claimed birth in San Francisco. Thereafter he secured deferment from induction on the ground of his occupation as a chicken rancher. Later he worked for a while in the shipyards, and then went into the restaurant business. (T. 15, 25.)

On October 1, 1945, he was apprehended and indicted for failure to report his change of status. (T. 25.) He was sentenced on November 27, 1945, to a term of six months in prison on this charge. (T. 26.) (This sentence being imposed by Hon. Louis

E. Goodman, the Judge hearing the petition for naturalization of the appellant.)

On May 17, 1946, he enlisted in the United States Army and again claimed birth in the United States. (T. 15.) He was still serving therein when his petition for naturalization came before the District Court for final hearing on November 23, 1949. (T. 26.) On November 30, 1949, the District Court denied the petition for the reason that he had failed to establish good moral character as required by Section 324(a) of the Nationality Act of 1940, (8 USC 724a). (T. 20.) Although the Army authorities were informed of the subject's alienage they replied that no action was contemplated toward discharging him since the Army regulations governing the case made no provision for discharges of that nature. (T. 27, 29.)

On November 18, 1949, the petitioner finally admitted that he had been born in China, had procured the fraudulent affidavits there, and had claimed to be a native-born citizen of the United States because that was the only way to obtain entry into the United States. (T. 17.)

CONTENTIONS OF APPELLANT.

The appellant contends that his petition for naturalization should have been granted for the following reasons:

(1) Because Section 324(a) requires the applicant to establish only that he served in the

armed forces of the United States for the requisite period under honorable conditions. (T. 32, 33.) (Appellant's Brief, p. 5.)

(2) That a duly authenticated copy of his service record setting out that fact is conclusive evidence of his good moral character. (Appellant's Brief, p. 5.)

ARGUMENT.

Throughout the history of naturalization legislation Congress has placed wide discretion in the courts in matters of so general and important a prerequisite as good moral character. What conduct on the part of a petitioner for naturalization does or does not constitute good moral character is a matter of fact within the sound judgment of the trial Court. *U. S. v. Bischof,* C.C.A.N.Y. 1931, 48 F. (2d) 538. *U. S. v. Beda,* C.C.A.N.Y. 1941, 118 F. (2d) 458. *Petitions of Rudder,* 159 F. (2d) 659, 697. The question is to be determined from the facts of each particular case. *Daddona v. U. S.,* 170 F. (2d) 964, 966:

> "Good moral character for the prescribed period is a question of fact."

The appellant contends, in essence, that once his Army service record was placed in evidence the trial judge was estopped from further consideration of his fitness for citizenship with respect to his moral character. In support of this view appellant cites the case of *In re Fong Chew Chung,* 149 F. (2d) 904, for the

generalization that the trial Court could not go back of the honorable discharge. In that case, however, although the military authorities had officially certified the petitioner as having served honorably, the District Court nevertheless—having reason to believe that the petitioner's ignorance of the English language was assumed only for the purpose of effecting his quick discharge from the Army—concluded that the soldier had not "served honorably" and, in fact, had not "served" at all within the meaning of the naturalization statute.

In the instant case the Court accepted the appellant's military record for all it purported to be, but held that notwithstanding the Army's certification, the petitioner by his conduct during the statutory period preceding his petition had failed to establish his good moral character. From the facts the cases are clearly distinguishable, and the case cited by the appellant is not in point on the issue here.

It is submitted that the trial court in the instant case did not commit error, since the policy of the courts has consistently been to deny naturalization to aliens violating our laws during statutory probationary periods. *Turley v. U. S.,* C.C.A. Wyoming, 31 F. (2d) 696. An alien who was in every way qualified for citizenship except that he had violated the immigration laws of the United States by smuggling another into the United States, was held not entitled to citizenship. *In re Nybo,* C.C.A. Mich. 1930, 42 F. (2d) 727. Where petitioners have deliberately made false statements regarding citizenship or other mate-

rial matters the courts have generally denied their petitions. In *Petition of Ledo,* D.C.R.I. 1946, 67 F. Supp. 567, the petition was denied because the applicant had made false statements under oath to a naturalization examiner and had represented himself to officials at a United States Navy Base depot that he was a citizen of the United States.

An applicant for citizenship has the burden of showing that he has behaved as a person of good moral character for the requisite period of time. *Petition of Zele,* C.C.A.N.Y. 1942, 127 F. (2d) 578.

It will be noted that under Title 8, USC, §724(b), it is provided that a petitioner for citizenship under this section shall comply in all respects with the requirements of Title 8 USC, §707, except that

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the Court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section.

The instant appellant filed his petition for naturalization in the Court below under Title 8, §724. This section does not indicate any intention to exempt from the usual requirements of good moral character or attachment to the principles of the Constitution of

the United States, and favorable disposition toward the good order and happiness of the United States, any petitioner for naturalization under this section. This will readily appear by reference 2. (See appendix.)

It will be noted in this connection that Title 8, USC, §724(e) specifically mentions that a petitioner for citizenship under 8 USC, §724 is expected to show good moral character as is required under the basic provisions of section 707(a).

The government in this case is not in any degree challenging the certification that the appellant did perform honorable military service in accordance with the requirements of the United States Army, but it is submitted that the admitted conduct of the appellant, both prior to and including the statutory naturalization period was such as to clearly support a finding by the trial Court that he had not established his good moral character to the Court's satisfaction, as required by law.

Congress could never have intended the granting of citizenship to one who was not attached to the principles of the Constitution of the United States, nor of a person not of good moral character, merely because of service in the military forces of the United States; such a construction if carried to its logical extreme would require the naturalization of persons convicted of treason, espionage, rape, murder, or other heinous crimes.

THE CONTENTION OF THE APPELLANT THAT AN HONORABLE DISCHARGE FROM THE UNITED STATES ARMY IS CONCLUSIVE EVIDENCE OF GOOD MORAL CHARACTER IS NOT IN ACCORDANCE WITH THE OPINION OF THIS COURT IN *UNITED STATES v. SAMUEL HARRISON,* No. 12,354, DECIDED MARCH 24, 1950.

CONCLUSION.

The appellee feels that the order of the District Court of the United States dated November 30, 1949, denying the petition of the appellant for citizenship was proper and should therefore be affirmed.

Dated, San Francisco, California,
March 29, 1950.

Respectfully submitted,

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Attorneys for Appellee.

STANLEY B. JOHNSTON,
Adjudications Division, Immigration and Naturalization Service,
On the Brief.

(Appendix Follows.)

Appendix.

Appendix

Section 324(a) of the Nationality Act of 1940 (8 U.S.C.A. 724(a)), provides as follows:

> A person who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions may be naturalized without having resided, continuously immediately preceding the date of filing such person's intention, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after termination of such service. (54 Stat. 1149; 8 U.S.C. 724.)

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of

this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service. (54 Stat. 1149; 8 U.S.C. 724.)

(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by section 309. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization. (54 Stat. 1149; 8 U.S.C. 724.)

(d) The petitioner shall comply with the requirements of section 309 as to continuous residence in the United States for at least five years and in the State

in which the petition is filed for at least six months, immediately preceding the date of filing the petition, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service shall be considered as residence within the United States or the State. (54 Stat. 1149; 8 U.S.C. 724.)

(e) Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of affidavits and testimony or depositions of witnesses. (54 Stat. 1149-1150; 8 U.S.C. 724.)

NOTE: 8 USC §701. Jurisdiction to naturalize: "(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing, or which may hereafter be established by Congress in any State. District Courts of the United States for the Territories of Hawaii and Alaska, and for the District of Columbia and for Puerto Rico, and the District Court of the Virgin Islands of the United States; * * *".

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Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee.

APPELLANT'S REPLY BRIEF.

The appellee seeks to have this appeal dismissed on the ground that the proper party defendant has not been named (Appellee's Brief, p. 3).

This case is an ex parte action in which the United States is a proper, and always a possible adverse party. *Tutun v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L.Ed. 738. It is equally true that the government is a proper but not an indispensable party litigant.[1]

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[1]Section 334(d) of the Nationality Act of 1940, 8 U.S.C.A. 734(d), provides:

> "The United States shall have the right to appear before any court in any naturalization proceeding for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

Congress, pursuant to the provisions of Article I, Section 8(4) of the Constitution of the United States, entrusted to certain courts the power to entertain and determine naturalization. Yet, at no time has Congress seen fit to enact legislation that would make the United States an indispensable party to any or all petitions.

A majority of the Federal Courts have considered petitions for naturalization where the cases were captioned as ex parte actions without naming the United States as a defendant.[2] The United States

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[2]C.C.A., 2 Cir., *Petition of Rudder*, 159 F. 2d 695;
C.C.A., 2 Cir., *Petition of Kohl*, 146 F. 2d 347;
C.C.A., 7 Cir., *Application of Murra*, 178 F. 2d 670;
C.C.A., 7 Cir., *Petition of Kaudadias*, 177 F. 2d 497;
C.C.A., 7 Cir., *In re Jaw Gin*, 175 F. 2d 299;
C.C.A., 9 Cir., *In re Fong Chew Chung*, 149 F. 2d 904;
D.C. Ala. *In re Kontos*, 12 F. 2d 134;
D.C. Cal. *In re Paoli*, 49 F. Supp. 128;
D.C. Del. *In re Sawyer*, 59 F. Supp. 428;
D.C. Fla. *In re Patience*, 14 F. 2d 624;
D.C. Ga. *In re Rosenbleeth*, 38 F. Supp. 383;
D.C. Idaho *In re Aldecoa*, 22 F. Supp. 659;
D.C. Ill. *Petition of Zaoral*, 34 F. Supp. 930;
D.C. La. *Petition of Gani*, 86 F. Supp. 683;
D.C. Md. *Application of Levis*, 46 F. Supp. 527;
D.C. Mass. *Ex parte Mohriez*, 54 F. Supp. 941;
D.C. Mich. *Petition of Ludecke*, 31 F. Supp. 521;
D.C. Minn. *In re Taran*, 52 F. Supp. 535;
D.C. Mo. *In re De Mayo*, 26 F. Supp. 996;
D.C. Mont. *In re Prime*, 40 F. 2d 972;
D.C. Neb. *Application of Wiebe*, 82 F. Supp. 130;
D.C. N.J. *Petition of Reginelli*, 86 F. Supp. 599;
D.C. N.Y. *Petition of Taffel*, 49 F. Supp. 109;
D.C. Ohio *In re Appugliese*, 58 F. Supp. 829;
D.C. Ore. *In re Oppenheimer*, 61 F. Supp. 403;
D.C. Pa. *Petition of Husch*, 50 F. Supp. 538;
D.C. R.I. *Petition of Ledo*, 67 F. Supp. 917;
D.C. S.C. *Ex parte Fillibertie*, 62 F. Supp. 744;
D.C. S.D. *Petition of Zogbaum*, 32 F. 2d 911;

Supreme Court very recently considered a case, involving a petition for naturalization, wherein the Immigration and Naturalization Service was named as party defendant. (See *Martin Ludwig Cohnstaedt, petitioner v. Immigration and Naturalization Service of the United States Department of Justice.* Petition for certiorari granted December 5, 1949. 70 S. Ct. 240. Judgment reversed, per curiam opinion dated February 20, 1950, 70 S.Ct. 582, 94 L.Ed. 429).

Rule 73 of the Federal Rules of Civil Procedure sets forth the prescribed manner in which appeals to the Court of Appeals shall be taken. It provides that a notice of appeal shall specify the parties taking the appeal, the court to which the appeal is taken, and the procedure of filing such notice with the clerk of the district court. In the case of *Maloney, et al v. Spencer,* 170 F. (2d) 231, 232, this court stated:

> "The administratrix has filed a suggestion of death in this court and, appearing specially, has moved to dismiss the appeal on the ground that at the time of filing the notice of appeal, no substitution of the administratrix had been made; therefore, there being no party against whom notice of appeal could operate no jurisdiction was conferred upon this court to entertain the appeal. We do not agree. We think the notice of appeal in and of itself, when filed in time, per-

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D.C. Tex. *In re Molsen,* 84 F. Supp. 515;
D.C. Va. *In re Sandstrom,* 14 F. 2d 675;
D.C. Wash. *Petition of Peterson,* 33 F. Supp. 615;
D.C. Wisc. *In re Urmeneta,* 42 F. Supp. 138;
D.C. D.C. *In re Falck,* 24 F. Supp. 672;
D.C. Hawaii *Application of Viloria,* 84 F. Supp. 584.

forms the function of transferring jurisdiction of the cause from the trial to the appellate court without regard to existing or probable future appellees. To acquire jurisdiction of the parties substitution is necessary.

"Rule 73(a) of Federal Rules of Civil Procedure, 28 U.S.C.A., provides that an appeal is taken by filing with the district court a notice of appeal. Rule 73(b) provides that the notice shall specify the parties taking the appeal, shall designate the judgment or parts thereof appealed from, and shall name the court to which an appeal is taken. *Nothing is said concerning the naming of the adverse parties.* * * *

"The jurisdictional feature, insofar as the appeal is concerned, seems to be that the motion of appeal should have been filed within the time limited." (Italics ours.)

Prior to adoption of the new Federal Rules of Civil Procedure the same opinion was expressed in the case of *McCullock v. Schafer,* 100 F. (2d) 939, 940, wherein the court stated:

"A citation to the appellate court is not jurisdictional of the cause. Its purpose is to give notice to the appellee that an appeal will be prosecuted so that he may appear if he so desires. *Sutherland v. Pearce,* 9 Cir., 186 F. 783; *The Framington Court,* 5 Cir., 69 F. (2d) 300; *U.S. v. Hairston,* 8 Cir., 55 F. (2d) 825. The Circuit Court of Appeals for the Eighth Circuit states in the latter case: 'While the rule is made with the expectation that it will be obeyed, its violation does not destroy jurisdiction of this court.' See also *Robertson v. Morganton Hosiery Co.,* 4 Cir.,

> 95 F. (2d) 780; *Weinstock v. Black Diamond S. S. Corp.*, 2 Cir., 31 F. (2d) 519. We therefore hold that dismissal of the appeal is not mandatory because of failure of appellant to serve citation, although certainly orderly procedure would dictate that the rules be strictly followed. * * * we are of the opinion that he had received adequate notice of the appeal, and that the court was not deprived of jurisdiction by appellant's failure to serve formal notice upon him."

Adoption of the new rules of Federal Civil Procedure eliminated the process of citation and provided in lieu thereof that the clerk of court would notify all of the adverse parties. A review of the record in this case will show that the United States Attorney, the designated representative of the United States of America, was appropriately advised of all of the proceedings in this matter.

Under date of December 7, 1949, this appellant filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, a timely notice of appeal as required under the provisions of Rule 73. The caption on this notice of appeal and all other papers filed with the clerk of court prior to the printing of the "Transcript of Record" are entitled: In the Matter of the Petition of Jim Yuen Jung for Naturalization. The courts have often followed the rule that mere clerical errors in describing the parties to an appeal or a writ of error, which cannot mislead, are not sufficient cause for dismissal. 4 C.J.S. 876.

The decisions of this court in the cases of *Bonham v. Chi Yan Chain Louie,* 166 F. (2d) 15, and *Carmichael v. Wong Choon Hoi,* 164 F. (2d) 696, both of which are relied upon by appellee as supporting his view are not in point with the facts in the instant case. In these cases, District Directors of the Immigration and Naturalization Service, both of whom were strangers to the proceedings in the lower court, attempted to insert themselves as appellants to the cause of action.

In the case at bar the appellant was the sole moving party in the lower court. Under Rule 73, an appeal is perfected by filing a proper notice of appeal, and the filing of that notice vests jurisdiction of the case in the appellate court. See *Daniels v. Goldberg,* 8 F.R.D. 580; *Walleck v. Hudspeth,* 128 F. (2d) 343, 344.

It is now asserted that the United States is and wants to be a party litigant to this appeal. It is conceded that such right is vested by statute and that the United States Attorney is the proper party to make such a motion. However, it is asserted that all rights of this appellant have been saved by strict compliance with all laws, rules, and regulations governing this matter.

The rights of the United States have in no way been prejudiced by the service of the notice of appeal on the District Director of the Immigration and Naturalization Service. Matter of fact, the contrary is true. The District Director of the Immigration and Naturalization Service is the proper delegated

agent of the United States to protect the enforcement of the naturalization statutes.[3] It was his duty to see that the interests of the United States were protected.

This court referred in the case of *Bonham v. Chi Yan Chain Louie,* supra, to the: "* * * duty of the administrator to cause the United States 'to appear' and become the party litigant." A decision of the Court of Appeals for the Tenth Circuit appears to be in accord. In *U. S. v. Golden,* 34 F. (2d) 367, 376, that court stated:

> "The United States, and not the Director, is a party to the contracts; the United States is the principal, the Director the agent; when the principal is rightfully in court, there is no need to bring in the agent. Besides, in an action where the agent of the government is a party, the courts look through the nominal party and treat the case as one in fact against the government. *State*

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[3]Reorganization Plan V of June 4, 1940, 54 Stat. 1238, 5 U.S.C. 133t, delegates administration of the naturalization laws to the Attorney General of the United States. Part 90.1 of Title 8, C.F.R. provides:

> "Under the general direction of the Attorney General, the Commissioner of Immigration and Naturalization (hereinafter called Commissioner) shall supervise and direct the administration of the Immigration and Naturalization Service and, subject to the limitations of other provisions of this Part, shall have authority to exercise all powers of the Attorney General relating to the administration of the immigration, nationality, and all other laws administered by the Service and shall designate such officers of the Service as he may select, with the approval of the Attorney General, to exercise any power or authority of the Attorney General in the administration of any designated specific provision of such laws."

Under Part 60.1 of the same title administration and enforcement of the immigration, nationality and other laws administered by the Service were delegated to the local District Directors of the Service.

Highway Commission of Wyoming v. Utah Construction Co., 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262; *Schroeder v. Davis,* 32 F. (2d) 455 (8 C.C.A.); *Kansas v. U.S.,* 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510."

In addition it may be stated that the rule is that a general appearance in an appellate court implies submission of the party to the jurisdiction of that court. Filing of a brief on the merits, or acceptance of service of the designation by appellant of parts to be incorporated on appeal, or acceptance of appellant's brief, operate as a waiver of process or notice. 4 C.J.S. 1086.

It is contended that if there was heretofore any lack of notice, which we deny, then the conduct of the appellee is in itself sufficient waiver to give this court jurisdiction of the United States as a party defendant.

It is appellant's contention that notice served upon Bruce G. Barber, as District Director of the Immigration and Naturalization Service, and as an agent of the United States, is service upon the United States. We agree with the contention of the government that Bruce G. Barber is not as an individual the proper party defendant. A review of the pleadings will show that the appellant has never considered him as such and that his name appears only through mistake and inadvertence for which neither appellant nor his counsel is responsible. It is submitted that the case should be properly entitled: "Petition of Jim Yuen Jung."

Wherefore, appellant prays that this court consider the appeal on the merits and that an appropriate order issue designating the title of the action.

Dated, San Francisco, California,
April 14, 1950.

Respectfully submitted,
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By JOSEPH S. HERTOGS,
Attorneys for Appellants.